Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

19 CFR Part 4

(T.D. 87–1)

CUSTOMS REGULATIONS AMENDMENT RELATING TO FOREIGN CLEARANCES OF VESSELS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document advises the public that Cambodia, Iran, Iraq, Laos, Libya, Nicaragua, and South Yemen are being added to the list of countries for which vessels may not be cleared by Customs to proceed to a foreign destination until complete outward foreign manifests and all required shipper's export declarations have been filed with the Customs district director. The document also revises the Customs Regulations pertaining to clearance of vessels with incomplete cargo declarations, incomplete export declarations, and bonds given in lieu thereof. As part of the continuing Customs program to update and revise its regulations, the document also will clarify foreign clearance procedures for carriers, importers and the public, and will greatly aid Customs in its enforcement of the export control regulations.

EFFECTIVE DATE: January 5, 1987.

FOR FURTHER INFORMATION CONTACT: Edward B. Gable, Jr., Carriers, Drawback and Bonds Division, (202–566–5732).

SUPPLEMENTARY INFORMATION:

Background

Section 4.75, Customs Regulations (19 CFR 4.75), currently provides the clearance procedures for vessels bound for a foreign port or ports which have incomplete cargo declarations, incomplete export declarations, and bonds given in lieu thereof. In addition, footnote 109 to § 4.75(c) lists the countries for which vessels may not be cleared by Customs to proceed to a foreign destination until complete outward foreign manifests and all shipper's export declarations have been filed with the Customs district director. Such action

is necessary as an aid to the enforcement of export laws and regulations by the Customs Service.

Customs is adding Cambodia, Iran, Iraq, Laos, Libya, Nicaragua, and South Yemen to that list of countries. Further, as part of its continuing program to update its regulations, Customs is removing footnote 109 to § 4.75(c) and placing the list of countries contained therein in revised § 4.75(c). In addition to the above changes, this document revises the existing language of § 4.75, and deletes the unnecessary citation to 50 U.S.C. 191 from the section. Footnotes 106, 107 and 108 are also being deleted, as they are unnecessary.

These changes will clarify foreign clearance procedures for carriers, importers and the public, and will greatly aid Customs in its enforcement of the export control regulations.

Executive Order 12291

It has been determined that this amendment is not a "major rule" within the criteria provided in § 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this final rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Drafting Information

The principal authors of this document were Glen E. Vereb and Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service Headquarters. However, personnel from other offices participated in its development.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because vessels of Cambodia, Iran, Iraq, Laos, Libya, Nicaragua, and South Yemen pose immediate potential export control risks to the U.S., it is contrary to the public interest to delay implementation of the changes by seeking comments. Because the rest of the amendment merely revises and updates existing sections of the Customs Regulations, it is impracticable and unnecessary to seek public comments. Therefore, it has been determined that good cause exists for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B). Further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(3).

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Imports, Vessels.

AMENDMENTS TO THE REGULATIONS

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4, Customs Regulations (19 CFR Part 4), continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 91, 2103. There are no changes in the specific authority citations for Part 4.

2. Section 4.75 is revised to read as follows:

§ 4.75 Incomplete manifest; incomplete export declarations; bond.

(a) *Pro forma manifest.* Except as provided for in § 4.75(c), if a master desiring to clear his vessel for a foreign port does not have available for filing with the district director a complete Cargo Declaration Outward with Commercial Forms, Customs Form 1302–A (see § 4.63) in accordance with 46 U.S.C. 91, or all required shipper's export declarations (see 15 CFR 30.24), the district director may accept in lieu thereof an incomplete manifest (referred to as a pro forma manifest) on the General Declaration, Customs Form 1301, if there is on file in his office a bond on Customs Form 301, containing the bond conditions set forth in § 113.64 of this chapter relating to international carriers, executed by the vessel owner or other person as attorney in fact of the vessel owner. The legend, "This incomplete Cargo Declaration is filed in accordance with § 4.75, Customs Regulations," shall be inserted in item 16 of the General Declaration. The form shall be appropriately modified to indicate that it is an incomplete Cargo Declaration, and the Master's Oath on Entry of Vessel in Foreign Trade, Customs Form 1300 (see § 4.63(a)), shall be executed.

(b) *Time in which to file complete manifest and export declarations.* Not later than the fourth business day after clearance from each port in the vessel's itinerary, the master, or the vessel's agent on behalf of the master, shall deliver to the district director at each port a complete Cargo Declaration Outward with Commercial Forms, Customs Form 1302 A, in accordance with § 4.63, of the cargo laden at such port together with duplicate copies of all required shipper's export declarations for such cargo and a General Declaration on Customs Form 1301. The oath of the master or agent on the Master's Oath on Entry of Vessel in Foreign Trade, Customs Form 1300 (see § 4.63(a)), shall be properly executed before acceptance. The statutory grace period of 4 days for filing the complete manifest and missing export declarations begins to run on the first day (exclusive of any day on which the customhouse is not open for marine business) following the date on which clearance is granted.

(c) *Countries for which vessels may not be cleared until complete manifests and shipper's export declarations are filed.* To aid the Customs Service in the enforcement of export laws and regulations, no vessel shall be cleared for any port in the following countries until a complete outward foreign manifest and all required shipper's export declarations have been filed with the district director:

Albania
Bulgaria
Cambodia
China, People's Republic of
Cuba
Czechoslovakia
Estonia
German Democratic Republic (Soviet Zone of Germany and Soviet Zone sector of Berlin)
Hungary
Iran
Iraq
Laos
Latvia
Libya
Lithuania
Mongolian People's Republic
Nicaragua
North Korea
Polish People's Republic (Including Danzig)
Rumania
South Yemen
Union of Soviet Socialist Republics
Viet Nam

3. Part 4 is amended by deleting footnotes 106, 107, 108 and 109.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: November 20, 1986.

MICHAEL H. LANE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, January 5, 1987 (52 FR 254)]

U.S. Customs Service

General Notice

19 CFR Part 24

CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation of interest.

SUMMARY: This notice advises the public that 26 U.S.C. 6621 has been amended by the Tax Reform Act of 1986 (P. L. 99–514), to establish a new method of determining the adjusted rate of interest on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term Federal rate and will be adjusted quarterly. The interest rate, as set by the Internal Revenue Service, will be 9 percent for underpayments and 8 percent for overpayments for the quarter beginning January 1, 1987. It is being published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: January 1, 1987.

FOR FURTHER INFORMATION CONTACT: Robert Hamilton, Revenue Branch, National Finance Center, U.S. Customs Service, P.O. Box 68901, Indianapolis, IN 46268 (317) 298–1245.

SUPPLEMENTARY INFORMATION:

Background

By T.D. 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), Customs advised the public that, in order to implement §§ 621 and 210 of Pub. L. 98–573, the Trade and Tariff Act of 1984, interest on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established in 26 U.S.C. 6621 and 6622. Both the rate paid to the Treasury for underpayments, and the rate that Treasury paid for overpayments was the same rate. In addition, the date was determined semi-annually for the 6-month periods ending on September 30 and March 31 of each year. The rate used was the prime rate

quoted by large commercial banks as determined by the Board of Governors of the Federal Reserve System.

This determination covered antidumping and countervailing duty payments, and increased or additional Customs duties determined to be due on a liquidation or reliquidation of an entry. In addition, T.D. 85-93 also stated that it has been determined that a uniform interest payment system should be established and that refunds pursuant to a court determination and payable under 28 U.S.C. 2644, and interest on overpayments and underpayments of estimated excise taxes determined at liquidation shall be assessed at the rate prescribed under 26 U.S.C. 6621 and 6622.

The Tax Reform Act of 1986 (P. L. 99-514), amended 26 U.S.C. 6621 mandating a new method of determining the interest rate. The new method provides a two-tier system based on the short-term Federal rate. As amended, 26 U.S.C. 6621 provides that the interest rate that the treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

Determination

It has been determined that the rate of interest for the period of January 1, 1987–April 1, 1987, is 9 percent for underpayments and 8 percent for overpayments. This rate will remain in effect until April 1, 1987, when it is subject to change. Appropriate amendments will be made to the Customs Regulations in a future document.

Dated: December 29, 1986.

William von Raab,
Commissioner of Customs.

[Published in the Federal Register, January 5, 1987 (52 FR 255)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86–877)

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ V.O.F. AND AKZONA INC., APPELLANTS *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, E.I. DU-PONT DE NEMOURS AND CO., INTERVENOR-APPELLEE

Dennis McInerney, Cahill Gordon and Reindel, of New York, New York argued for appellants. With him on the brief were *David R. Hyde, Laurence T. Sorkin, George Wailand* and *P. Kevin Castel. C. Frederick Leydig,* Leydig, Voit and Mayer, LTD., of Chicago, Illinois, argued for appellants. With him on the brief were *Charles S. Oslakovic, John Kilyk, Jr.,* and *Norval B. Galloway.* Also on the brief were *Robert H. Falk,* Hubbard, Thurman, Turner and Tucker, of Dallas, Texas, *Tom M. Schaumberg* and *Cecilia H. Gonzalez,* Plaia and Schaumberg, Chartered, of Washington, D.C.

Catherine Field, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With her on the brief was *Michael P. Mabile,* Assistant General Counsel.

Daniel M. Gribbon, Covington and Burling, of Washington, D.C., argued for intervenor-appellee. With him on the brief were *Harris Weinstein, James R. Atwood, Eugene D. Gulland, Dwight C. Smith, III* and *Stephen H. Marcus. Joseph M. Fitzpatrick,* Fitzpatrick, Cella Harper and Scinto, of New York, New York, argued for intervenor-appellee. With him on the brief were *John A. O'Brien, Henry J. Renk, Charles P. Baker, Laura A. Bauer* and *Bruce C. Haas.*

Appealed from: U.S. Court of International Trade Commission.

(Appeal No. 86–877)

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ V.O.F. AND AKZONA INC., APPELLANTS *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, E.I. DU-PONT DE NEMOURS AND CO., INTERVENOR-APPELLEE

(Decided December 22, 1986)

Before MARKEY, *Chief Judge,* DAVIS and NIES, *Circuit Judges.*

DAVIS, *Circuit Judge.*

This is an appeal by Akzo N.V., Enka B.V., Aramide Maatschappij V.O.F. and Akzona Inc. (appellants or Akzo) from an exclusion order by the United States International Trade Commission (Commission or trial tribunal) pursuant to §§ 337 and 337a of the Tariff Act of 1930, 19 U.S.C. §§ 1337, 1337a (1982), prohibiting the impor-

tation into the United States of aramid fibers manufactured by Akzo in the Netherlands. We affirm.

I. Background; Issues; Scope of Review

A. *Background.* On April 18, 1984, E.I. du Pont de Nemours and Company (appellee or Du Pont) filed a complaint with the Commission under § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337).[1] The complaint alleged that Akzo had engaged in unfair methods of competition and unfair acts including the importation, sale and marketing in the United States of certain aramid fibers[2] produced in the Netherlands by a process purportedly covered by the claims of Du Pont's U.S. Letters Patent No. 3,767,756 (the Blades or '756 patent). In addition, the complaint charged Akzo with attempting both to exploit applications of aramid fibers and to penetrate markets for aramid fibers created by Du Pont. Finally, the complaint alleged that the effect or tendency of the unfair methods of competition and unfair acts was to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

After evaluating Du Pont's complaint, the Commission instituted an investigation pursuant to § 337(b), 19 U.S.C. § 1337(b), and an administrative law judge (ALJ) was assigned to preside over the investigation.

The major substantive question before the ALJ (and now before us) is the validity and enforceability of Du Pont's Blades patent. Those issues, and the related facts and circumstances, are set forth and discussed in Part II, *infra.* The major procedural issue is whether Akzo was denied due process because Du Pont's confidential documents were not disclosed to appellants' management. This problem (together with an alleged violation of treaty rights) is considered in Part III, *infra.* The other issues presented to us are dealt with in Part IV, *infra.*

Following 14 days of hearing, the ALJ issued an initial determination holding that there was a violation of § 337(a) of the Tariff Act of 1930 in the unlawful importation or sale of certain aramid fibers produced overseas by means of a process that if practiced in the United States would infringe the Blades '756 patent, and that importation has the tendency to injure substantially an efficiently and economically operated industry in the United States.

Akzo filed a petition for review of the ALJ's initial determination on June 3, 1985. On July 15, 1985, the Commission decided to review only those portions of the initial determination pertaining to

[1] 19 U.S.C. § 1337 (1976) provides in pertinent part:

> Unfair practices in import trade
> (a) Unfair methods of competition declared unlawful
> Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

[2] As indicated in Part II, *infra,* aramid fibers are the strongest commercial synthetic fibers known to man—about five times stronger than steel on an equal weight basis.

anticipation and obviousness of the Blades '756 patent under 35 U.S.C. §§ 102 and 103. Ultimately, the Commission affirmed the ALJ's findings and conclusions on anticipation and obviousness and determined that appellants had failed to prove the Blades '756 patent invalid. Having decided not to review the remainder of the initial determination, the Commission concluded that there was a violation of § 337. Accordingly, on November 25, 1985, the Commission, after further consideration, entered an exclusion order limited to certain forms of aramid fibers produced by Akzo. The Commission's order became final on January 25, 1986 when the President declined to overrule it pursuant to § 337(g).

B. *Issues.* On this appeal, Akzo raises a number of issues for us to resolve:

(1) whether the Commission's finding that claim 13 of the '756 patent was "not invalid" and "not unenforceable" is supported by substantial evidence;[3]

(2) whether Akzo's due process and treaty rights were violated in the Commission proceeding;

(3) whether the Commission, as a non-Article III tribunal, is constitutionally prohibited from adjudicating the validity and enforceability of patents;

(4) whether the Commission's finding that Akzo's sales of aramid fibers in the United States would have a tendency to "destroy or substantially injure" an industry economically and efficiently operated is supported by substantial evidence;

(5) whether the Commission's conclusion that Du Pont's value-in-use pricing did not violate the antitrust laws is correct and supported by substantial evidence; and

(6) whether it is a defense to Du Pont's complaint that Du Pont employed a solvent included in a polymerization process patented by Akzo.

C. *Scope of review.* This court defined our scope of review in cases appealed from the Commission in *Beloit Corp.* v. *Valmet OY,* (Order), 742 F.2d 1421, 223 USPQ 193 (1984), *cert. denied,* 105 S. Ct. 2706, 86 L. Ed. 2d 721 (1985). There we held that the court "does not sit to review what the Commission has not decided." 742 F.2d at 1423, 223 USPQ at 194. *Beloit* is distinguishable from this case because there the Commission specifically adopted only a portion of the presiding official's initial decision. *See, e.g., American Hospital Supply Corp.* v. *Travenol Laboratories, Inc.,* 745 F.2d 1, 5 n.13, 223 USPQ 577, 580 N.13 (Fed. Cir. 1984). In contrast, in the current case, the Commission merely determined not to review the remainder of the initial decision, choosing to conduct its own §§ 102 and 103 analysis. The Commission neither rejected any part of the initial determination nor did it say that it was taking no position on any part of it. Although the Commission limited its own review to

[3] Akzo presents no contention that, if claim 13 of the '756 patent is valid and enforceable, Akzo would not infringe if it used its same process in this country.

patent validity under §§ 102 and 103, the fact that it affirmed the conclusion of the ALJ that there was a § 337 violation makes reviewable those conclusions of the ALJ necessary for the Commission to have determined (as it did) that there was a § 337 violation. *Accord Warner Brothers, Inc.* v. *U.S. International Trade Commission*, 787 F.2d 562, 229 USPQ 126 (Fed. Cir. 1986). This includes not only the §§ 102 and 103 issues of anticipation and obviousness, but also whether there was inequitable conduct before the Patent Office and the other issues decided by the Commission and the ALJ.[4]

II. Validity and Enforceability of the Blades Patent

A. *The Invention.*[5] The Blades '756 patent, "Dry-Jet Wet Spinning Process." was issued on October 23, 1973 to Dr. Herbert Blades and immediately assigned to Du Pont. The patent describes a method that produces a high strength synthetic polyamide[6] fiber which Du Pont has marketed under the trade name Kevlar. This fiber has an extraordinary as-spun strength, five times stronger pound for pound than steel, as well as a modulus (stretch resistance) equal to glass, eight times as high as industrial grade polyester, and twenty-five times as high as industrial nylon. Kevlar is also much more heat resistant than industrial-grade nylon or polyester. These extraordinary physical properties, as well as Kevlar's light weight and rustproof character, have enabled Du Pont to market it for use in a variety of applications including, but not limited to, roping, spacecraft and airplane parts, bullet resistant clothing and armor, tires, and boat hulls. Depending upon its use, Kevlar has been used as a substitute for steel, aluminum, asbestos, nylon, rayon, polyester, cotton, or cotton fiber. Kevlar is available as either a continuous rope or filament, or alternatively as a staple or pulp. Staple consists of short filaments which can be spun into yarn. Pulp is ground fiber most often used as an asbestos substitute.

The procedure by which the synthetic fiber is manufactured involves dry spinning polyamides from coagulation solutions called dopes. In dry spinning, a specialized filter called a spinneret is placed a short distance from a bath of spinning dope that is extruded through a layer of gas and into an aqueous coagulation bath.[7] The dope used in the Blades '756 patent consists of para-positioned aromatic polyamides dissolved in highly concentrated sulfuric acid and heated to around 100°C. The polyamide used is a high molecular weight poly(p-phenylene terephthalamide) (PPD–T).

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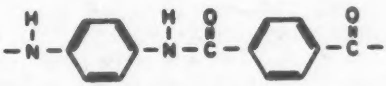
[4] 19 C.F.R. § 210.53(h)(1986) provides that "[a]n initial determination * * * shall become the determination of the Commission * * * unless the Commission * * * shall have ordered review of the initial determination or certain issues therein * * *." In accepting the necessary conclusions of the ALJ we do not hold that the Commission must have concurred with each and every individual factual finding of the ALJ to support its conclusion.

[5] Our recitation of the facts follows the ALJ's and the Commission's findings which are supported by at least substantial evidence. *See Surface Technology, Inc.* v. *U.S. International Trade Commission*, 801 F.2d 1336, 1340, 231 USPQ 192, 195 (Fed. Cir. 1986).

[6] Polyamides are polymers containing amide linkages. Aromatic polymers are polyamides where the radicals linking the amide linkages constitute aromatic radicals. The polymer described in claim 13 of the Blades '756 patent is a wholly aromatic para-positioned polyamide.

[7] Dry spinning can be contrasted with wet spinning where the spinneret is placed directly into the spinning dope. Wet spinning is the process used to make a number of synthetic fibers including rayon and nylon.



The high molecular weight of the polyamide results in a high inherent viscosity[8] of approximately 4.4% when 20% PPD–T by weight is dissolved in approximately 100% sulfuric acid.

In 1969 Dr. Blades, one of Du Pont's research scientists, began to develop and conduct experiments aimed at producing a high-strength synthetic fiber. Blades exclusively employed a wet-spinning method in his early work, using PPD–T as well as other polymers. This early work had minimal success. Although the dry-spinning method was known by Du Pont scientists, a 1966 report indicated that the low solubility of PPD–T precluded use of the dry-spinning technique. In 1969, Du Pont's Dr. Peter Boettcher suggested to Blades that dry spinning might improve the end-results by influencing coagulation. Dr. Boettcher had learned about dry spinning from a Monsanto Morgan patent (Morgan '645 patent).

Blades' early experimentation with the dry-spinning process did not yield fiber with an increased tenacity despite the fact that dry spinning was known to improve fiber tenacity using other dopes. Blades' initial conclusion was that dry spinning would be unsuccessful with PPD–T. Nevertheless, he continued experimenting with the dry-spinning process, and, at his supervisor's suggestion, began using sulfuric acid as a solvent. Blades also redesigned and built a mixing device because of some difficulties he encountered mixing PPD–T with the sulfuric acid. Sulfuric acid was not an evident candidate as a solvent because it was known to react with the polymer and become degraded at high temperatures. Blades discovered, however, that he could produce an improved fiber using 10.2% polyamide in about 100% sulfuric acid. Under this system he found that there was no difference in tensile strength of the fiber using a wet-spun or dry-spun method. PPD–T was a somewhat unusual choice of polymer for this work because of its characteristic rigidity caused by the placement of para-oriented aromatic rings in the chain. The para-positioning of the aromatic rings makes the polyamide much less soluble than analogous meta-positioned rings. But the fact is that, while meta-positioned polymers generally form only isotropic solutions, para-positioned polymers of Blades' invention form anisotropic solutions[9] at high concentrations.

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[8] Inherent viscosity (γ inh) is a measure of viscosity used in polymer chemistry.

$$\gamma\,\text{inh} = \ln \gamma\, r/c \qquad \text{where } \gamma_r = \gamma/_{\gamma 0} = \frac{\text{solution viscosity}}{\text{solvent viscosity}}$$

measured at the same temperature.

[9] An anisotropic solution exhibits optical birefringence (i.e., the liquid crystalline solution refracts light in two directions). This characteristic imparts a high degree of orientation to the spun fibers yielding a stiffer and stronger end product without requiring post-coagulation drawing as is required in other man-made fibers such as nylon and rayon.

In subsequent trials, Blades increased the concentration of PPD–T and obtained a significantly improved fiber, especially using the dry-spinning method. When the system was operated at room temperature, however, he found that undissolved polyamide clogged up the holes of the spinneret. He therefore heated the dope at these higher concentrations to dissolve all the polyamide and keep the system above the melting point. To his surprise, Blades discovered that there was little or no degradation of the polyamide at high temperatures. He explained this unexpected absence of degradation by theorizing that, when the system contains high concentrations of PPD–T, the sulfuric acid binds to the polymer and chemically deactivates it.

After numerous trials, Blades found that an optimal fiber could be produced using PPD–T of 4.4 inherent viscosity at a 20% concentration in approximately 100% sulfuric acid. The dope was then heated to 95°C and dry spinning was then carried out at about 100°C. The resultant fiber had a tenacity of approximately two times that of previous experimental fibers.

In April 1971, Blades filed an application with the PTO claiming the method of making these aramid fibers. The initial application and two subsequent applications were rejected in large part on the basis of anticipation by the Morgan '645 and the Kwolek '542 patents which Du Pont had brought to the attention of the examiner. Initially the examiner also rejected the application under 35 U.S.C. § 103. Blades, however, was able to overcome the examiner's objections, and on May 2, 1973, the PTO gave notice of allowance of the Blades '756 patent. Blades assigned the patent rights to Du Pont.

B. *Validity.* Claim 13, the narrowest claim, is the only claim involved on this appeal.[10] Akzo says that that claim is invalid under 35 U.S.C. §§ 102 and 103. More specifically, Akzo argues that the Commission misconstrued the legal standard of anticipation and therefore erroneously held that the Blades '756 patent was not anticipated. In addition, appellants argue that the Commission failed properly to evaluate the prior art in determining obviousness *vel non.* Of course, it goes without elaboration that the Blades '756 patent enjoys a presumption of validity under 35 U.S.C. § 282.

As we have said, Akzo challenges the Commission's use of § 102, claiming that that tribunal misinterpreted the legal standard of anticipation. Under 35 U.S.C. § 102, anticipation requires that each and every element of the claimed invention be disclosed in a prior art reference. *W.L. Gore & Associates, Inc.* v. *Garlock, Inc.,* 721 F.2d 1540, 1554, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied,* 469 U.S. 851 (1984). In addition, the prior art reference must be enabling, thus placing the allegedly disclosed matter in the possession

[10] Claim 13 reads as follows:

> A method comprising extruding a spinning dope from an orifice through a layer of gas and into an aqueous bath at a temperature of under 50°C said dope comprising a polyamide and a solvent of sulfuric acid of at least 98% concentration at a concentration of at least 40 grams of said polyamide per 100 ml. of solvent, said polyamide having an inherent viscosity of at lest 3.0 and being poly(p-phenylene terephthalamide).

of the public. *In re Brown,* 329 F.2d 1006, 1011, 141 USPQ 245, 249 (CCPA 1964). Akzo asserts, however, that the Commission wrongly used an "*ipsissimis verbis* test" in reaching its conclusion that the Blades '756 patent was not anticipated by the Morgan '645 disclosure.[11] We do not read the Commission's opinion as requiring such an "*ipsissimis verbis* test." Rather, we understand that opinion as simply finding that the prior art reference did not disclose, to one of ordinary skill in the art,[12] the process for making the aramid fibers described in claim 13. The Commission noted that while the Morgan '645 patent called for the use of sulfuric acid, it did not call for the use of at least 98% concentrated sulfuric acid which was critical for the success of the Blades process. The Commission also concurred with the ALJ and found that concentrated sulfuric acid is not inherently 98% sulfuric acid to one skilled in the art.

Because we determine that the Commission did not use an incorrect legal standard under § 102, we are bound to accept its and the ALJ's factual findings if supported by substantial evidence. 5 U.S.C. § 706 (1982). As appellants themselves point out, anticipation under § 102 is a factual determination. *Lindemann Maschinenfabrik GMBH* v. *American Hoist & Derrick Co.,* 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984). We must conclude that there is substantial evidence in the record supporting the Commission's conclusion that claim 13 of the Blades '756 patent was not anticipated by the prior art. As the Supreme Court noted in *Universal Camera* v. *NLRB,* 340 U.S. 474, 488 (1951), the substantial evidence standard does not allow a court to conduct a *de novo* investigation of the evidence on the record before it and reach an independent conclusion; rather, the court's review is limited to deciding whether there is sufficient evidence in the record considered as a whole to support the agency's findings. The mere fact that a reasonable person might reach some other conclusion is insufficient for this court to overturn the agency's conclusion. *See SSIH Equipment S.A.* v. *U.S. International Trade Commission,* 718 F.2d 365, 381, 218 USPQ 678, 691 (Fed. Cir. 1983) (additional views of Judge Nies).

The ALJ concluded, after extensive analysis, that the claimed invention of the Blades '756 patent was not anticipated by prior art, including the Morgan '645 patent. He noted that, while the Morgan '645 patent teaches the use of an airgap, the use of an airgap in and of itself does not guarantee an improved fiber. This was obvious from Blades' early work. The ALJ also found that sulfuric acid in any concentration was not disclosed as a solvent in the Morgan '645 patent; nor did that patent disclose PPD-T in its optically anisotropic state. Moreover, the ALJ found that the Morgan '645 patent was not an enabling disclosure with regard to the claimed spinning dope. Neither the 18% concentration of PPD-T nor the heating of the dope to achieve this concentration was disclosed in the Morgan

[11] An "*ipsissimis verbis*" test requires the same terminology in the prior art in order find anticipation.

[12] The Commission made specific findings on the skill of the art. It concluded that the skill in the art was high—that of a doctorate or post-doctorate in chemistry.

'645 patent. The ALJ also rejected appellants' arguments that the Blades process was anticipated by the Hill and Smith patents which were referenced in the Morgan '645 patent. This would have required Blades randomly to pick and choose among a number of different polyamides, a plurality of solvents, and a range of inherent viscosities. The ALJ rejected such "random picking and choosing" of prior art, relying on *In re Arkley,* 455 F.2d 586, 587, 172 USPQ 524, 526 (CCPA 1972), and concluded in effect that the anticipatory reference must disclose in the prior art a thing substantially identical with the claimed invention. In a somewhat more limited consideration—restricted to the concentration of sulfuric acid in the Blades patent—the Commission itself reached the same result.

Accordingly, we hold that there is substantial evidence in the record as a whole to sustain the Commission's (including the ALJ's) findings that the Blades process was not anticipated by any prior art.[13]

Appellants say, as an alternative to their § 102 argument, that the trial tribunal erred when it failed to find that the Blades '756 patent would have been obvious under 35 U.S.C. § 103 in view of the Morgan '645 and Kwolek '542 patents. It is now established that obviousness is a question of law based on factual inquiries which include:

(1) the scope and content of the prior art;
(2) the difference between prior art and the claims at stake;
(3) the level of ordinary skill in the art; and
(4) objective evidence of nonobviousness (secondary factors).

Such objective indications as commercial success and long-felt but unresolved needs, failure of others, copying, and unexpected results are relevant facts relating to the issue of validity. *See, e.g., In re DeBlauwe,* 736 F.2d 699, 222 USPQ 191 (Fed. Cir. 1984) (obviousness a question of law to be determined on the facts). Since obviousness is a question of law, we are not bound by the Commission's ultimate determination on the matter of § 103 obviousness. *See Corning Glass Works* v. *U.S. International Trade Commission,* 779 F.2d 1559, 1565 & n.5, 230 USPQ 822, 826 & n.5 (Fed. Cir. 1986).

In the proceedings before the Commission, Du Pont premised its defense of nonobviousness on the basis that the prior art—mainly that the Morgan '645 patent and the Kwolek '542 patent—actually led away rather than toward the Blades process. The Commission found Du Pont's expert witness' testimony to be compelling. That witness, Dr. Uhlmann, explained why the Morgan '645 patent, when considered with other prior art references, including the Kwolek '542, Bair '941, and Cipriani '793 patents, would not have rendered the invention of Blades '756 patent obvious. The Kwolek

[13] Appellants cite this court's opinion in *Titanium Metals Corp.* v. *Banner*, 778 F.2d 775, 782, 227 USPQ 773, 778–79 (Fed. Cir. 1985), as supporting their contention that the Blades '756 patent was anticipated by the prior art. *Titanium Metals* is easily distinguishable from this case. There, a single reference disclosed a range of alloys including that claimed by appellant. In this case, the Commission found that neither the Morgan '645 patent nor any other prior art reference disclosed the Blades '756 process.

'542 patent calls for conventional wet or dry spinning and calls for concentrations of PPD–T far lower than required by the Blades process. The Bair '941 patent does not disclose heating sulfuric acid with PPD–T to achieve an anisotropic solution. While the Morgan '745 patent discloses air-gap spinning, its emphasis is on metaoriented polymers. Based on these differences, Dr. Uhlmann concluded that one skilled in the art would *not* combine them or be led to the Blades invention.

As the ALJ recognized, prior art references before the tribunal must be read as a whole and consideration must be given where the references diverge and teach away from the claimed invention. *W.L. Gore & Associates, Inc.* v. *Garlock,* 721 F.2d 1540, 1550, 220 USPQ 303, 311 (Fed. Cir. 1983), *cert. denied,* 469 U.S. 851 (1984). Moreover, appellants cannot pick and choose among individual parts of assorted prior art references "as a mosaic to recreate a facsimile of the claimed invention." 721 F.2d at 1552, 220 USPQ at 312. In this case, the ALJ found that Akzo's expert witnesses could not show how the prior art patents could be brought together to render the Blades '756 invention obvious without reconstructing the teachings of those patents assisted by hindsight.

The secondary considerations also compelled the Commission to make a finding of nonobviousness. The commercial success of Du Pont's Kevlar patent has been enormous and its range of uses substantial. Du Pont is still developing commercial applications for Kevlar, having spent significant amounts of money in developing both new uses and new markets for the product. Commercial success is, of course, a strong factor favoring nonobviousness. *Simmons Fastener Corp.* v. *Illinois Tool Works, Inc.,* 739 F.2d 1573, 1575–76, 222 USPQ 774, 777, (Fed. Cir. 1984), *cert. denied,* 471 U.S. 1065 (1985). Moreover, as the ALJ noted, Blades solved a problem that Du Pont research scientists had been tackling for years. The Blades process represents a solution to a long-felt need and practitioners in the field immediately recognized that that process was a remarkable advancement in polymer spinning technology. Indeed, as brought out in this appeal, even one of Akzo's scientific reports repeatedly expressed concern for degradation of PPD–T and amazement at the disclosure of the Blades '756 process.

We agree, therefore, with the Commission's determination that the Blades '756 patent is not invalid for anticipation or obviousness.

C. *Alleged inequitable conduct before the Patent and Trademark Office (PTO).* Appellants urge that Du Pont misled the patent examiner in two respects: first, that Du Pont submitted an affidavit to overcome the examiner's obviousness objections that failed to compare the Blades process with the closest prior art; and, second, that Du Pont persistently argued that the Morgan '645 patent and the Kwolek '542 patent did not anticipate the Blades patent.

In *J.P. Stevens & Co.* v. *Tex Lex Ltd.,* 747 F.2d 1553, 223 USPQ 1089 (Fed. Cir. 1984), *cert. denied,* 106 S. Ct. 73 (1985), this court ar-

ticulated a two-prong test for establishing inequitable conduct before the PTO. To render a patent unenforceable, the proponent of the inequitable conduct must first establish by clear and convincing evidence that there was a material misrepresentation or omission of information, and then establish a threshold level of intent on the part of the applicant. *See also Atlas Powder Co.* v. *E.I. du Pont de Nemours & Co.*, 750 F.2d 1569, 1577–78, 224 USPQ 409, 414–15 (Fed. Cir. 1984).

Our major standard for materiality is whether a reasonable examiner would consider the omission or misrepresentation important in deciding whether to issue the patent.[14] Materiality and intent must also be considered together: the more material the omission or misrepresentation, the less intent that must be shown to reach a conclusion of inequitable conduct. *American Hoist & Derrick Co.* v. *Sowa & Sons*, 725 F.2d 1350, 1363, 220 USPQ 763, 773 (Fed. Cir.), *cert. denied*, 469 U.S. 821, 224 USPQ 520 (1984).

We uphold the Commission's findings and conclusion that Du Pont's affidavit or arguments before the examiner did not constitute material misrepresentations. As Akzo concedes, the examiner had both the Morgan '645 patent and the Kwolek '542 patents before him throughout the examination process. It was on the basis of these two patents that Du Pont's first three applications were rejected. The mere fact that Du Pont attempted to distinguish the Blades process from the prior art does not constitute a material omission or misrepresentation. The examiner was free to reach his own conclusion regarding the Blades process based on the art in front of him. Nor does Du Pont's affidavit, advocating a particular interpretation of the Morgan '645 and Kwolek '542 patents (albeit favorable to Du Pont's position), show any intent to mislead the PTO. Du Pont's intent was not to mislead, but rather to distinguish prior art from the Blades process and demonstrate to the examiner that the Blades process would not have been obvious in light of Morgan '645 and Kwolek '542. The sum of it is that, because we cannot see either a proved material misrepresentation or a proved intent to mislead, we must conclude that Akzo has not met its burden of proving inequitable conduct before the PTO.

III. Due Process and Treaty Rights

A. *Due Process*. This aspect of the appeal concerns the Commission's procedures with respect to the private parties' confidential information. On May 21, 1984, the ALJ issued an administrative protective order pertaining to confidential business information, as defined in the Commission's Rules, 19 C.F.R. § 210.30(d)(7) (1976), that would be produced during the discovery phase of the investigation.

In general, this order permitted access to all such confidential information by Akzo's and Du Pont's outside counsel but not by man-

[14] This standard is identical to the PTO standard of materiality. 37 C.F.R. § 1.56(a).

agement personnel or in-house counsel of either private company. At a preliminary conference held June 22, 1984, Akzo made the first of three unsuccessful attempts to modify the protective order. Arguing that there was a substantial overlap between the Commission's investigation and an action brought by Akzo against Du Pont then (and still) pending in the United States District Court for the District of Delaware, Akzo moved to align the protective orders by modifying the ALJ's protective order so that its terms coincided with those of a protective order earlier issued by the District Court in the Delaware action. The ALJ denied Akzo's motion on July 6, 1984.

By letter dated June 27, 1984, Akzo requested that the protective order be amended to include three designated members of Akzo's in-house counsel. On July 6, 1984, the ALJ concluded that Akzo failed to demonstrate the requisite need to warrant granting Akzo's in-house counsel access to Du Pont's confidential business information. Akzo renewed its motion to modify the protective order on February 8, 1985, this time urging that both Akzo's in-house counsel and the general manager of Akzo's Industrial Fiber Group should be granted limited access to Du Pont's confidential business information. Because Akzo failed (in the ALJ's view) to demonstrate a need for either its in-house counsel or its general manager to have access to the requested confidential material, the ALJ denied Akzo's motion on February 21, 1985.

Akzo now contends that the protective order, issued by the ALJ on May 21, 1984, effectively deprived it of its rights to confrontation, to rebuttal, and to effective assistance of counsel. According to Akzo, under the terms of the protective order, the parties' designation of materials as confidential had the effect of "unilaterally immunizing them from scrutiny by the opposing party." Moreover, Akzo maintains that the system established by the protective order completely denied Akzo "access to all of the critical evidence on which the decision against it was based."

Our examination of the challenged protective order, as it was enforced, shows Akzo's charges to be groundless. The protective order provides, *inter alia*, that confidential business information "shall be disclosed at any hearing only *in camera* before the Commission or the administrative law judge." Although the protective order enabled either party to designate business information as confidential, such a designation did not "unilaterally immunize" purportedly confidential documents from scrutiny by the opposing party. In the first place, all the protected information was freely available to outside counsel who could fully consider it, although they were not free to show or repeat it to Akzo's management or in-house counsel. Second, paragraph 10 of the protective order provided a mechanism by which either party was free to object to its adversary's designations at any stage of the proceeding. According to paragraph 10, if either party disagreed with respect to the designation of business

material as confidential, that party "shall confer [with the supplier] as to the status of the subject information proffered within the context of this order." In the event that the parties failed within 10 days to reach agreement as to the proper status of the information, the protective order provided that either party could submit the issue to the ALJ or the Commission for resolution. The mechanism of paragraph 10 could also be used to permit disclosure to particular persons of otherwise classified material. Although, as mentioned earlier, Akzo attempted to modify the protective order on three separate occasions, Akzo never invoked the dispute resolution procedures of paragraph 10 to challenge Du Pont's characterization of business information as confidential or as not disclosable to particular individuals. Third, the protective order expressly permitted other exceptions to be made by the ALJ or the Commission.

In denying Akzo's various motions to amend the protective order, the ALJ relied on the Commission's decision in *Certain Rotary Wheel Printers*, Inv. No. 337-TA-145, 5 ITRD 1933 (Nov. 4, 1983). According to *Rotary Wheel Printers:*

> [p]rotection of confidential information is crucial to the Commission's ability to carry out its statutory responsibilities. In addition, review after discovery and the evidentiary hearing are completed would provide an inadequate remedy. The inappropriate release of confidential information can never be fully remedied.
>
> The Commission has traditionally been reluctant to release confidential information where not absolutely necessary.

5 ITRD at 1935.

Thus, implicit in Akzo's due process attack on the protective order is the position that, in the interests of fundamental fairness, it was "absolutely necessary" for Akzo's in-house counsel and general manager to have access to Du Pont's confidential business information. However, "[i]n section 337 investigations, it is the exception rather than the rule to release confidential information to in-house counsel." *Id.*

The primary justification for the Commission's reluctance to grant adversary management and in-house counsel access to confidential business information is that, in order to discharge its statutory responsibilities within the strict statutory time limits, the Commission is heavily dependent on the voluntary submission of information. Disclosure of sensitive materials to an adversary would undoubtedly have a chilling effect on the parties' willingness to provide the confidential information essential to the Commission's fact-finding processes. The Commission has resolved the difficult and controversial question of the role of in-house counsel by taking a conservative position on the side of optimum shielding of business information. Obviously, where confidential material is disclosed to an employee of a competitor, the risk of the competitor's obtaining

an unfair business advantage may be substantially increased. This general Commission position is neither unreasonable nor arbitrary. It represents an appropriate balancing between the needs demanded by the Commission's process and the parties' need for participation by its in-house personnel.

This is especially true because there is no *per se* rule against disclosure to either a competitor's in-house counsel or management representative. *Rotary Wheel Printers* established, and the ALJ employed, a three-part balancing test to determine whether, to whom, and under what conditions to release confidential information. Factors to be considered include the party's need for the confidential information sought in order to adequately prepare its case, the harm that disclosure would cause the party submitting the information, and the forum's interest in maintaining the confidentiality of the information sought. 5 ITRD at 1937.

After reviewing the record, the ALJ concluded that Akzo failed to demonstrate clearly a need for granting access to confidential business information to either Akzo's in-house counsel or key management officials. The ALJ also found that disclosure would cause substantial harm to Du Pont's competitive position. These particular rulings cannot be faulted. The court understands that all information relating to patent validity and enforceability (*see* Part II, *supra*) was promptly made fully available to all. As for the information bearing on the important question of whether Akzo's importation of aramid fibers would tend to destroy or substantially injure Du Pont's business (*see* Part IV, *infra*), it is obvious that that confidential information—relating to Du Pont's business, activities, plans and expectations—should not be made available (unless, perhaps, where absolutely necessary for a fair hearing) to a direct competitor like Akzo. That such full access was not absolutely necessary to appellants' making of their own case is shown by the crucial fact that Akzo was at all times perfectly free to offer its own market projections as well as to reveal its own activities, forecasts, and interpretations. Both sides could present to the Commission their own information on those matters without knowing those of the other side's.

Akzo argues, however, that the denial of its motions to modify the protective order effectively denied its due process right to participate in its own defense. The contention is that Akzo was subjected to serious adverse governmental action on the basis of evidence which Akzo was never permitted to know and "personally" refute. In support of this position, Akzo invokes § 555(b) of the Administrative Procedure Act which was made applicable to § 337 proceedings by the 1974 Amendments to the Tariff Act of 1930. Under § 555(b), "[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." 5 U.S.C. § 555(b). However, Akzo was represented by competent and experienced outside counsel throughout the proceedings; these counsel were aware of all confidential information. Further, Akzo

fails to recognize that "the affirmative grant of the right to appear apparently bestowed by Section 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business." *deVyver* v. *Warden, U.S. Penitentiary,* 388 F. Supp. 1213, 1222 (M.D. Pa. 1974) citing *Easton Utilities Commission* v. *Atomic Energy Commission,* 424 F.2d 847, 852 (D.C. Cir. 1970). Whatever else § 555(b) guarantees to parties to an administrative proceeding under § 337, it does not mandate disclosure of significant confidential information to in-house counsel and corporate executives of a business competitor—where that information is fully available to outside counsel. Akzo's contention withers in the face of unrefuted evidence that more than 90 people representing Akzo, including numerous expert witnesses and members of the battery of four law firms comprising Akzo's defense team, had unrestricted access to Du Pont's confidential information.

Akzo has also failed to demonstrate that it suffered actual harm under the confidentiality procedures instituted by the ALJ. Although Akzo's insiders were denied access to Du Pont's economic and market forecasts with respect to the production and sale of aramid fibers, Akzo was not prevented (as we have pointed out) from offering its own projections into evidence under the cover of confidentiality. It is difficult to see how Akzo was prejudiced.

Finally, we have neither found nor been directed to any judicial decision in this country mandating, in the circumstances present here, that business confidential information *must* be made available to inside management. On the contrary, we are aware, from the practice of our own court, that records in appeals to us are frequently classified in large part, and are presumably not available to the management of the opposing party. Moreover, there are a substantial number of decisions upholding confidentiality comparable to that accepted by the Commission. Akzo tells us that most of these involved only pretrial discovery (and not evidence at a hearing or trial) and that the others are also distinguishable. We do not stop to examine these arguments because, at the least, these decisions (a) show that there is no holding to the contrary of the one we now make and (b) strongly suggest the validity of carefully tailored protective orders allowing exceptions to be made if adequate proof is made.[15]

B. *Treaty rights.* As an alternate ground for reversal, Akzo argues that, because the proceedings below discriminated against Akzo on the basis of its Dutch nationality, they violate United States treaty obligations. We disagree with Akzo's premise that there was discrimination here. Essentially, Akzo employs a *non sequitur* to support its position. The core of Akzo's claim is that it was

[15] This case differs from *Viscofan S.A.* v. *U.S. International Trade Commission,* 787 F.2d 544, 552, 229 USPQ 118, 124 (Fed. Cir. 1986), because here (but not in *Viscofan*) the confidentiality problem was directly related to the propriety of the exclusion order. Accordingly, we have reviewed the merits of the confidentiality actions. *See American Telephone and Telegraph Co.* v. *U.S. International Trade Commission,* 626 F.2d 841, 842, 206 USPQ 111, 112 (CCPA 1980).

denied the rights that would have been afforded a domestic firm used for patent infringement in a district court. According to Akzo, this "inferior treatment" by the Commission constitutes discrimination on the basis of nationality. That analysis misses the mark. The appropriate inquiry is whether Akzo was afforded the same rights afforded to domestic firms in a *§ 337 proceeding* before the *Commission*. Clearly, Akzo has failed to demonstrate that it suffered from discriminatory treatment. First, under the express terms of the protective order, both Akzo and Du Pont were bound by identical procedures regarding confidentiality and discovery. Neither party was allowed access to the other party's confidential business information. Second, the same argument was rejected in *Certain Spring Assemblies and Components Thereof*, Inv. No. 337-TA-88, 216 USPQ 225, *aff'd sub nom. General Motors Corp.* v. *U.S. International Trade Commission*, 687 F.2d 476, 215 USPQ 484 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983). In that case, respondent unsuccessfully raised certain U.S.-Canadian treaties as a defense to enforcement of § 337. The Commission observed:

> Section 337 does not discriminate against foreign corporations by virtue of their foreign status. It applies to foreign and domestic corporations alike. Section 337 gives the Commission jurisdiction over products imported from a foreign country, *even if they are manufactured and/or imported by a U.S. corporation.* The Commission's jurisdiction lies in unfair acts occurring in connection with the importation of goods into the United States or their sale, and it extends to all persons engaged in such unfair acts.

216 USPQ at 231 (emphasis added).

IV. Other Issues

In this part we consider four separate issues raised by appellants: (1) whether the Commission properly found that continued importation of Akzo's product would substantially injure or tend to injure Du Pont; (2) whether adjudication of § 337 actions by a non-Article III tribunal is unlawful; (3) whether Du Pont's pricing practices (with respect to its aramid products) violate the antitrust laws; and (4) whether Du Pont committed inequitable conduct by infringing Akzo's own patent.

A. *Tendency to destroy or substantially injure.* The ALJ concluded (and we have upheld) that Akzo violated § 337(a) by the unlawful importation or sale of certain aramid fibers produced in the Netherlands by means of a process which if practiced in the United States would infringe the Blades '756 patent. Such acts, long considered to be violative of § 337, clearly constitute unfair acts for the purposes of the statute. *See, e.g., In re Chain Door Locks,* USITC Pub. No. 770 (Apr. 1976), 191 USPQ 272 (USITC 1976); *In re Von Clemm,* 229 F.2d 441, 108 USPQ 371 (CCPA 1955); *In re Amtorg Trading Corp.*, 75 F.2d 826, 24 USPQ 315 (CCPA), *cert. denied,* 296 U.S. 576 (1935).

However, unfair acts, without more, are legally insufficient to support a finding of a § 337 violation. That provision declares unlawful "[u]nfair methods of competition and unfair acts in the importation of articles * * *, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States." Thus, to prove a violation of § 337, the complainant must show both an unfair act and a resulting detrimental effect or tendency. *New England Butt Co.* v. *U.S. International Trade Commission,* 756 F.2d 874, 876, 225 USPQ 260, 261 (Fed. Cir. 1985). As this court recently held in *Textron, Inc.* v. *U.S. International Trade Commission,* 753 F.2d 1019, 224 USPQ 625 (Fed. Cir. 1985), "section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof." 753 F.2d at 1028, 224 USPQ at 631 (citations omitted); *accord Corning Glass Works* v. *U.S. International Trade Commission,* 799 F.2d 1559, 230 USPQ 822 (Fed. Cir. 1986); *Warner Brothers, Inc.* v. *U.S. International Trade Commission,* 787 F.2d 562, 564, 229 USPQ 126, 127 (Fed. Cir. 1986).

According to *Textron,* "Congress may well have included this separate requirement * * * to insure that the extreme and internationally provocative remedy contemplated [by § 337]—exclusion of imports from particular countries—would be implemented only when this is compelled by strong economic reasons." 753 F.2d at 1028–29, 224 USPQ at 631 (citations omitted). It follows that the mere concurrence of an unfair act and some resulting injury is not necessarily sufficient, in itself, to establish a violation of § 337. "Congress has directed that the remedy of section 337, involving as it does the act of the sovereign in closing our borders to certain imports, be exercised only in those instances where at least there is proof of a tendency to *substantially* injure the subject industry." *Corning Glass Works* v. *U.S. International Trade Commission,* 799 F.2d 1559, 1567, 230 USPQ 822, 827 (Fed. Cir. 1986) (emphasis in original).

Not only is an injury determination intimately wed to the particular facts of each case, but also the determination of injury is precisely the type of question which Congress has committed to the expertise of the Commission. Thus, on appeal, our review of an injury determination is limited to deciding whether the Commission's decision is supported by substantial evidence. 19 U.S.C. § 1337(c) (1982); 5 U.S.C. § 706 (1982); *SSIH Equipment S.A.* v. *U.S. International Trade Commission,* 718 F.2d 365, 371, 218 USPQ 678, 684 (Fed. Cir. 1983); *General Motors Corp.* v. *U.S. International Trade Commission,* 687 F.2d 476, 215 USPQ 484 (CCPA 1982), *cert. denied,* 459 U.S. 1105 (1983). In other words, we must decide "whether substantial evidence supports the facts relied on and whether the Commissioner's [sic] determination, on the record, is arbitrary, capricious, or an abuse of discretion." *Corning Glass Works,* 799 F.2d at 1568, 230 USPQ at 828. As we noted in *Corning Glass Works,* "the question of quantum of injury is not one on which it would be appropri-

ate for this court to put forth a legal standard." *Id.* Nor are we allowed to substitute our own judgment for that of the Commission. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971). Of course, a decision is supported by substantial evidence if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1983).

Our review of the record in this case compels the conclusion that the Commission's determination—that Akzo's unfair imports of aramid fibers will have a tendency to injure Du Pont substantially —is supported by substantial evidence. The Commission based its injury determination on a prediction of the future effect of Akzo's unfair imports on the domestic industry. There is substantial support for this determination. The record reflects Akzo's intent and capacity to enter the United States aramid fibers market, Du Pont's resulting loss of revenue, and a probable price reduction by Du Pont in response to Akzo's entry into the United States market. Nonetheless, Akzo urges this court to overturn the Commission's exclusion order and deny relief to Du Pont. Akzo first contends that its projected share of the U.S. market during the remaining life of the '756 patent is *de minimis*. It would be both unwise and improper for this court to establish some arbitrary market-share benchmark as a prerequisite to a finding of a § 337 violation and we decline to do so. It is sufficient that the record supports the Commission's conclusion that, upon entry into the U.S. market, Akzo will capture a significant share of the domestic market, if not in relative percentage figures than certainly in absolute dollar figures.

Second, Akzo maintains that, notwithstanding its entry into the market, Du Pont's aramid fibers sales volumes, revenues and profits will all increase during the remaining life of the patent. But Akzo mischaracterizes the proper standard for measuring injury. The issue is not whether Du Pont's sales, revenues and profits will increase beyond their 1985 levels but rather whether Akzo's presence in the market will substantially injure Du Pont's business during the 1986–1990 period (the remaining life of the Blades '756 patent).

As Du Pont correctly points out, nothing in § 337 requires a showing that the domestic industry will be utterly deprived of profitability. "Where the unfair practice is the importation of products that infringe a domestic industry's * * * patent right, even a relatively small loss of sales may establish, under section 337(a), the requisite injury * * *." *Bally/Midway Mfg. Co.* v. *U.S. International Trade Commission,* 714 F.2d 1117, 1124, 219 USPQ 97, 102 (Fed. Cir. 1983). This proposition is entirely consistent with the legislative history of § 337. In a House Report discussing the application of § 337 to unfair competition involving patent infringement, Congress stated: "Where unfair methods and acts have resulted in *conceivable losses of sales,* a tendency to substantially injure such industry has been

established." *See* House Comm. on Ways and Means, Trade Reform Act of 1973, H.R. Rep. No. 571, 93d Cong. 1st Sess. 78 (1973) (emphasis added); *accord In re Von Clemm,* 229 F.2d 441, 445, 108 USPQ 371, 374 (CCPA 1955).

Because substantial evidence supports the facts relied upon by the Commission in making its determination that Akzo's unfair imports would tend to injure Du Pont substantially, we must affirm its injury determination. Akzo has failed to demonstrate that the Commission's determination is arbitrary, capricious, or an abuse of discretion.

A contrary result would emasculate the protections of § 337 with respect to high technology ventures. Typically, in high technology industries, acute competition forces competitors to commit substantial resources to research and development in hopes of generating profits before either their patents expire or before technological advance makes the products obsolete. Thus, innovators frequently resign themselves to losses during the early life of their patents with the expectation that, if product development and marketing efforts are successful, profits earned during the later life of their patents will provide sufficient compensation for their endeavors.

On this record, Du Pont's aramid fibers industry can be said to furnish a classic illustration. Although Du Pont has undertaken extensive product development and marketing efforts since 1973, the company had not earned any return on its investment through 1984. Du Pont anticipates that it will realize its first positive net operating earnings from its aramid fibers production in 1985.

In reaching its injury determination, the Commission permissibly recognized that the aramid fibers industry is in transition from a period requiring extremely high investment of resources to a period when the industry will finally realize a return on that investment. In these circumstances, diminished profits, lower return on investment, and reduced sales are all indicative of substantial injury.

B. *Adjudication of § 337 actions by a non-Article III tribunal.* Apparently employing the "kitchen sink" or "let's try anything" approach to appellate advocacy, Akzo raises an additional challenge to the Commission's proceedings. Relying primarily on *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982), Akzo characterizes the current § 337 proceedings as "inherently judicial" involving "essentially private rights" and concludes that the constitution requires adjudication of § 337 issues by Article III Courts. Both Akzo's premise and conclusion are flawed. Although it is true that private rights may be affected by § 337 determinations, the thrust of the statute is directed toward the protection of the public interest from unfair trade practices in international commerce. As this court recognized in *Young Engineers, Inc.* v. *U.S. International Trade Commission,* 721 F.2d 1305, 1315, 219 USPQ 1142, 1152 (Fed. Cir. 1983), a § 337 proceeding "is not purely private litigation 'between the parties' but rather is an 'investigation' by

the Government into unfair methods of competition or unfair acts in the importation of articles into the United States." Moreover, "[t]he power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Buttfield* v. *Stranahan,* 192 U.S. 470, 492 (1904). Properly viewed, § 337 and its predecessor provisions represent a valid delegation of this broad Congressional power for the public purpose of providing an adequate remedy for domestic industries against unfair practices beginning abroad and culminating in importation. *Sealed Air Corp.* v. *U.S. International Trade Commission,* 645 F.2d 976, 985–86, 209 USPQ 469, 478 (CCPA 1981).

C. *Du Pont's pricing practices.* Under Du Pont's value-in-use pricing program, the price at which Du Pont sells aramid fibers varies in accordance with the particular end-use to which the purchaser puts the product. Although Du Pont's customers may use the aramid fibers for whatever purpose they desire, they are required to pay Du Pont the price appropriate to the ultimate end-use. To that objective, Du Pont requires its customers to agree that they will use the aramid fibers for the specific end-use for which they are purchased or, if the aramid fibers are put to a different end-use or are resold, that they will pay Du Pont an amount representing the difference between the initial purchase price and the price for the ultimate end-use.

According to Akzo, each such agreement constitutes a "contract * * * in restraint of trade," and the entire pattern of agreements, policing and surveillance constitutes a "combination * * * in restraint of trade" within the meaning of § 1 of the Sherman act. Although the Commission specifically found that "the adoption of Du Pont's value-in-use pricing strategy reflects price competition with other substitute products for various end uses," Akzo continues to argue that Du Pont's value-in-use pricing for aramid fibers violates the antitrust laws.

Plainly, value-in-use pricing is not *per se* an anticompetitive restraint on trade within the meaning of the antitrust laws. In *Carter-Wallace, Inc.* v. *United States,* 449 F.2d 1374, 171 USPQ 359 (Ct. Cl. 1971), one of this court's predecessor courts sustained against an antitrust challenge a pricing system in which purchasers paid a lower price for the drug meprobamate when used in certain combination drugs. The court noted that "the vendee firms, if one looks at their business as a whole, are not prohibited or deterred from making any use they wish of the meprobamate." *Id.* at 1379, 171 USPQ at 362. Moreover, "[i]t is even reasonable to assume, nothing else appearing, that if the vendees change their minds after purchasing the drug at the lower price they can make unrestricted use of it by paying the difference between that lower price and the consent-decree price." *Id.* at 1379 n.4, 171 USPQ at 362 n.4.

Similarly, under Du Pont's value-in-use pricing system, its customers may use their aramid fibers for whatever purpose they desire, including resale, providing they pay Du Pont the price appropriate to the ultimate end-use. Contrary to Akzo's position that Du Pont's pricing system is anticompetitive and an unreasonable restriction on use and resale, the Commission found and the record establishes that Du Pont's value-in-use pricing has the procompetitive effect of increasing the volume of aramid fibers that are sold.

Akzo also claims that the ALJ erred in not making specific findings on market definition. But, as this court recently observed, the trier of fact need not engage in the meaningless exercise of market definition where no wrongful conduct has been shown. *Loctite Corp.* v. *Ultraseal Ltd.*, 781 F.2d 861, 875, 228 USPQ 90, 100 (Fed. Cir. 1985). Equally groundless is Akzo's contention that the ALJ erred by not shifting to Du Pont the burden of demonstrating that its pricing policies had procompetitive effects. The Supreme Court, in *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1984), made abundantly clear that the burden of proof shifts only where the evidence shows that the challenged practice has the "hallmarks of anticompetitive behavior," namely, that "it has operated to raise prices and reduce output." *Id.* at 113. Conversely, in this case, the evidence establishes and the Commission found that the alleged "restraint," value-in-use pricing, results in reduced prices and increased output.

D. *Du Pont's alleged inequitable conduct in manufacture.* During the proceedings below, Akzo asserted that Du Pont infringed Akzo's U.S. patent 4,308,374 ('374 patent) on a polymerization solvent system used in the formulation of the polymer which is spun into aramid fibers by means of the Blades '756 process. Notwithstanding § 337(c) of the Tariff Act of 1930 which provides that "[a]ll legal and equitable defenses may be presented," the ALJ struck Akzo's equitable defense and refused to hear the underlying evidence. On appeal, Akzo contends that the ALJ thus denied Akzo the opportunity to establish a meritorious defense to Du Pont's § 337 claim. For two reasons we disagree that this defense was meritorious.

Our conclusion is first supported by the recent decision of the District Court for the Eastern District of Virginia holding the '374 patent invalid for obviousness under 35 U.S.C. § 103. *Akzo N.V.* v. *E.I. DuPont de Nemours & Co.*, Civil Action No. 85–0459–R (E.D. Va. April 24, 1986), on appeal to this court, No. 86–1327/1568.[16] Under that decision, Akzo's infringement claim has been adversely decided and Du Pont has a legal right to do the act claimed to be infringing. Consequently, there is as yet no legitimate basis for Akzo's equitable defense. *See Young Engineers, Inc.* v. *U.S. International Trade Commission*, 721 F.2d 1305, 1315–16, 219 USPQ 1142, 1152 (Fed. Cir. 1983). Second, this same result is compelled in this instance by

[16] That appeal was argued on November 7, 1986 before the same panel of judges as heard on the current appeal.

this court's decision in *SSIH Equipment S.A.* v. *U.S. International Trade Commission*, 718 F.2d 365, 218 USPQ 678 (Fed. Cir. 1983). In *SSIH*, we held that allegedly "inequitable conduct" is not a defense to a § 337 action where the conduct occurred after issuance of the complainant's patent and involved a different patent. *Id.* at 378–79, 218 USPQ at 689–90. In this case, Du Pont's '756 patent was issued in 1973 and pertains to a spinning process; Akzo's '374 patent was issued in 1981 and pertains to a polymerization process.

CONCLUSION

For these reasons, we affirm the Commission's exclusion order prohibiting the importation into the United States of aramid fibers manufactured by Akzo in the Netherlands.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-127)

NATIONAL CORN GROWERS ASSOCIATION, NEW ENERGY COMPANY OF INDIANA, ARCHER DANIELS MIDLAND CO., OHIO FARM BUREAU FEDERATION, INC., AND SOUTH POINT ETHANOL, PLAINTIFFS *v.* WILLIAM VON RAAB, COMMISSIONER, U. S. CUSTOMS SERVICE, UNITED STATES OF AMERICA, DEFENDANTS AND TROPICANA ENERGY CO., INC., PARTY-IN-INTEREST

Court No. 86-4-00487

Before HONORABLE NICHOLAS TSOUCALAS, *Judge.*

[Party-In-Interest's motion to dismiss granted.]

(Decided December 10, 1986)

Williams & Connolly (Aubrey M. Daniel, III, Stephen L. Urbanczyk, Manley W. Roberts and *Robert W. Hamilton)* for plaintiffs.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*Saul Davis* and *Paula N. Rubin*) for defendants.

McDermott, Will & Emery (*R. Sarah Compton, Kurt J. Olson* and *Lizbeth R. Levinson*) for party-in-interest.

OPINION

TSOUCALAS, *Judge:* This action is before the Court on the motion by party-in-interest, Tropicana Energy Co., Inc. (Tropicana), to dismiss plaintiffs' action as moot due to the enactment of the Tax Reform Act of 1986, Pub. L. 99-514, H.R. 3838, 99th Cong., 2d Sess. (1986).[1]

BACKGROUND

Plaintiffs, domestic manufacturers of ethanol, commenced an action, pursuant to 19 U.S.C. § 1516 (1982), to contest the duty-free entry of ethanol from the Caribbean into the United States. Party-in-interest, Tropicana, is engaged in the importation of ethanol (ethyl alcohol) to be used as fuel. It operates at least one purification facility in Kingston, Jamaica which utilizes hydrous ethyl alcohol feedstock imported from Brazil, Spain, and other nations. This feedback

[1] Tropicana originally sought a stay of the proceedings. After enactment of the legislation, it requested that the motion be treated as one for dismissal. The federal defendants join Tropicana in support of the motion.

is subjected to a process of azeotropic distillation which essentially removes the water and allows the now anhydrous alcohol to serve as motor vehicle fuel. By processing the ethanol in Jamaica, Tropicana has been able to take advantage of the provisions of the Caribbean Basin Economic Recovery Act (CBERA), Pub. L. 98–67, Title II, 97 Stat. 384 (1983), codified as amended at 19 U.S.C. §§ 2701–2706 (Supp. II 1984). Under CBERA, articles imported directly into the customs territory of the United States may qualify for duty-free treatment[2] if (a) they are wholly the product or manufacture of a designated beneficiary country or (b) they are substantially transformed into a new or different article within a beneficiary country and if they meet certain local content restrictions. *See* 19 U.S.C. § 2703(a). Customs has ruled that the azeotropic distillation process is a substantial transformation and therefore has accorded duty-free treatment to Tropicana's imported ethanol. The validity of these rulings forms the underlying substantive dispute in this action. At this juncture, however, the Court only considers Tropicana's motion to dismiss due to enactment of the Tax Reform Act of 1986, which it asserts will moot plaintiffs' claim for relief.

Tax Reform Act

The Tax Reform Act of 1986 represents the culmination of efforts to rewrite the federal tax code. It also contains a number of provisions which impact upon the nation's trade laws. Of interest in this action is § 423 which specifies tariff treatment for ethyl alcohol fuel. In effect, § 423 represents a decision to legislatively overrule Customs' decisions holding that azeotropic distillation is a substantial transformation that warrants duty-free treatment under CBERA. Congress has determined that the distillation facilities do not provide the type of economic development opportunities that justify preferential tariff treatment. In the language of the legislative history, they are "pass-through" operations. H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–132 (1986). "[T]he conferees seek to encourage meaningful economic investment in CBI countries and insular possessions." *Id.* Accordingly, Congress has tightened the requirements for duty-free treatment of ethanol under CBERA. The new requirement is that, subject to one exception, "no ethyl alcohol or a mixture thereof may be considered [to qualify for duty-free treatment as a product of a beneficiary country] unless the ethyl alcohol or mixture thereof is an indigenous product of that insular possession of beneficiary country." § 423(a). Section 423(c)(2) defines "indigenous product" as follows:

> (2) Ethyl alcohol or a mixture thereof may be treated as being an indigenous product of an insular possession or beneficiary country only if the ethyl alcohol or a mixture thereof—

[2] The tariff on imported fuel ethanol would otherwise be 3% *ad val.* plus $ .60 per gallon pursuant to items 427.88 and 901.50, TSUS.

> (A) has been both dehydrated and produced by a process of full-scale fermentation within that insular possession or beneficiary country; or
>
> (B) has been dehydrated within that insular possession or beneficiary country from hydrous ethyl alcohol that includes hydrous ethyl alcohol which is wholly the product or manufacture of any insular possession or beneficiary country and which has a value not less than—[3]

Section 423(b) provides that up to 20,000,000 gallons of ethanol may be imported into the United States, not subject to § 423(a), in each of the calendar years 1987 and 1988 provided that it was dehydrated in a azeotropic distillation facility established before, and in operation on, January 1, 1986. Section 423(b)(1)(A).[4] It is the interpretation of the requirements of § 423(a) and § 423(b) relative to the terms of CBERA as presently enacted that is principally at issue for the purposes of this motion.

THE PARTIES' CLAIMS

Tropicana contends that the new statute renders this case moot. Under its interpretation, 20,000,000 gallons of ethanol may be imported into the United States duty-free in 1987 and 1988, as long as it is distilled in a qualifying facility. Any importations beyond that amount are governed by the § 423(c)(2) and § 423(a) requirements. These provisions would allow for duty-free treatment of azeotropically produced ethanol distillate so long as it was mixed with the proper amounts of locally produced ethanol. *See* § 423(c)(2)(B). The substantial transformation question presented by CBERA as currently enacted is not relevant to entries of ethanol fuel after December 31, 1986. Moreover, given the prospective nature of § 1516 relief, *see ASG Indus.* v. *United States,* 82 Cust. Ct. 101, 154, C.D. 4794, 467 F. Supp. 1200, 1242–43 (1979), this Court would be unable to order reliquidation of prior entries. *Cf.* 19 U.S.C. § 1514 (1982). Therefore, under Tropicana's view, there is no controversy for this Court to adjudicate since the bill has been enacted.

Predictably, plaintiffs take a different view of the statute. Their position is that "the duty status of [§ 423(b)] ethanol is unchanged by the bill and would be determined by the law as it now stands without reference to Section 423." *Plaintiff's Opposition to the Motion for a Stay* at 9–10. "[T]he only plausible interpretation of the drafter's intent is that if duty-free treatment is denied to the grandfathered ethanol as a result of this litigation, such treatment would also be denied to all other entries of ethanol merely dehydrated in the Caribbean, regardless of whether the ethanol is considered an 'indigenous product' under Section 423(c)(2)(B)." *Id.* at 13 n.3.

[3] The remainder of § 423(c)(2) specifies the local content rules which are not specifically at issue here.
[4] Tropicana's facility apparently meets this requirement.

In short, plaintiffs contest Tropicana's interpretation of § 423 on two grounds. First, even assuming all the other requirements of CBERA as currently enacted are met, plaintiffs assert that this Court must still rule that azeotropic distillation of ethanol is a substantial transformation in order for Tropicana to import the ethanol governed by § 423(b) without duty. Secondly, plaintiffs interpret § 423(a) as merely imposing a requirement in addition to those already present in existing law, to wit, that fuel ethanol, with the exception of § 423(b) ethanol, be an "indigenous product" as defined in § 423(c). Plaintiffs' seize upon the language of § 423(b) which they claim merely exempts 20,000,000 gallons in both 1987 and 1988 only from the rule announced in § 423(a) but not from the remainder of CBERA as currently enacted. Similarly, plaintiffs look to the language of § 423(a) to establish their interpretation: "no ethyl alcohol or mixture thereof may be considered * * * eligible for duty-free treatment * * * unless the ethyl alcohol or mixture thereof is an indigenous product of that insular possession or beneficiary country." Section 423(a). The negative language, it is asserted, means that the rule of § 423(a) is merely additional to the other requirements of 19 U.S.C. § 2703 and the rest of CBERA as it now stands.

Plaintiffs further contend that this Court is capable of awarding relief, regardless of the construction of § 423 adopted. Until the effective date of § 423, December 31, 1986, *see* § 423(g), the current version of CBERA is controlling. A declaration prior to that date that the Customs rulings are invalid would prevent duty-free treatment for the 1.5–2.0 million gallons of ethanol per month, *see Party-in-Interest's Motion to Stay* at 8, n.1, entering into the United States market under CBERA. *But see infra* at 37 n.8.

Additionally, plaintiffs oppose the motion to dismiss on the grounds that a declaratory judgment by this Court overturning Customs rulings would affect the administration of both existing and future trade laws that contain provisions similar to those of CBERA. Finally, plaintiffs contend that the equities favor denial of the motion. Plaintiffs allege that the domestic ethanol industry will be injured by continuing duty-free imports while Tropicana's only burden will be the cost of having to reply to plaintiffs' discovery demands which it voluntarily assumed by intervening in this action.

Discussion

Section 423

Congress has prescribed a unified scheme for tariff treatment of ethyl alcohol fuel. It has amended CBERA at 19 U.S.C. § 2703(a)(1) to be "subject to section 423 of the Tax Reform Act of 1986." Section 423(f)(2). All fuel ethanol from a beneficiary country qualifying for duty-free treatment must meet the criterion of § 423(a) as defined in § 423(c) except for the 20,000,000 gallons covered by § 423(b) which falls outside this statutory plan. There is no indication that Congress sought to retain the present substantial transformation law

with respect to the tariff treatment of fuel ethanol imports governed by § 423. The Conference Committee Agreement states:

> The conference agreement adopts in most respects section 864 of H.R. 4800. In so doing, the conferees disapprove U.S. Customs Service rulings that have found the mere dehydration of industrial-grade ethanol into fuel-grade ethanol to constitute a substantial transformation sufficient to qualify the dehydrated ethanol as a product of a CBI country or insular possession and therefore entitled to duty-free treatment * * *.
>
> Under the conference agreement, ethyl alcohol (or an ethyl alcohol mixture) may be admitted into the United States duty-free, if it is an indigenous product of a U.S. insular possession or CBI beneficiary country.
>
> * * * * * * *
>
> Transitional exemptions are provided during 1987 and 1988 for up to 20 million gallons per year each produced by certain azeotropic distillation facilities: (1) located in a CBI country or insular possession and in operation on January 1, 1986; or (2) the equipment for which was, on January 1, 1986, ready for shipment to and installation in a CBI country.

H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–131–II–132 (1986).

It is clear that Congress was displeased with the Customs rulings at issue in this case.[5] It is equally clear that Congress sought to give importers a respite from the stricter requirements embodied in the Tax Reform Act. The Court cannot agree that Congress chose, however, to ratify legislation that would ultimately serve to deny all duty-free treatment to the imported ethanol. This is what plaintiffs' construction of § 423 would accomplish. The House Committee Report to a predecessor bill, § 264, H.R. 4750, 99th Cong., 2d Sess. (1986),[6] materially identical to § 423, explains:

> *In fairness to companies that have made significant economic investment in reliance on existing customs rulings,* the section contains two grandfather clauses. The first one sets an annual cap of 20 million gallons during 1987 and 1988 for anhydrous alcohol produced in an azeotropic distillation facility which was in operation on January 1, 1986. The other grandfather clause excepts for one year a facility meeting certain requirements and located in the U.S. Virgin Islands.

H. Rep. No. 581, 99th Cong., 2d Sess. at 213 (1986) (emphasis added).

Plaintiffs' construction of the legislation would drain the exemptions contained in § 423(b) of any meaning and would conflict with the legislative history cited above. It would be anomalous for Congress, which enacted legislation with the stated purpose of protecting importers relying on existing Customs rulings, to then subject

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[5] I agree that nowhere is there "an indication that Congress meant to endorse or sanction these letter rulings," *Plaintiffs' Opposition to the Motion for a Stay* at 10, but I cannot accept the further assertion that Congress did not intend to "immunize them from judicial challenge in this case." *Id.* It would be curious if the legislature were to ratify legislation intending that a court review administrative rulings it unequivocally rejected in that legislation.

[6] The Conference Committee Agreement states that § 423 adopts "in most respects" the predecessor legislation, § 864, H.R. 4800, 99th Cong., 2d Sess. (1986). *See infra* at 35. Section 864 is largely identical to § 264, H.R. 4750, except for respective subsections (c)(2)(B), which provide for differing local content requirements.

those importers to the review of this Court which might very well rob them of the exemption. In short, why bother to enact an exemption that can be terminated by the decision of a judge? If indeed this were the legislative will, surely it could have been expressed in a far clearer fashion than it has been in this legislation.

Plaintiffs' construction of § 423(a) is likewise flawed. It is not sensible to interpret the requirements of § 423 as adding to all of the requirements under existing law. The Congressional purpose is amending CBERA was to encourage greater use of local sugar supplies in the Caribbean region and to disapprove of "pass-through" operations such as the mere dehydration of ethanol by azeotropic distillation. H. Rep. 581, 99th Cong., 2d Sess. 212–13 (1986). The legislation does this by mandating the use of specified percentages of locally fermented alcohol in ethanol mixtures to be imported duty-free into the United States. Section 423(c)(2)(B). For this Court to require that Tropicana, in order to obtain duty-free treatment, demonstrate that dehydration is a substantial transformation, in addition to meeting the dictates of § 423, would virtually guarantee that no fuel ethanol could be imported duty-free unless it were entirely produced and distilled in a Caribbean Basin nation.[7] This Court is unwilling to frustrate the operation of § 423 in such a manner.

The Court also cannot accept plaintiffs' contention that Congress, specifically aware of this litigation, intended that the legislation not interfere with the continuation of the action. While the legislative history is not illuminating on this point, Congress has demonstrated that, in other contexts, when it wishes to do so, it is quite capable of explicitly preserving existing causes of action. *See, e.g., Train* v. *City of New York,* 420 U.S. 35, 41 n.8 (1975) (action not moot where new legislation expressly preserved existing litigation). Indeed, there is nothing improper with the legislature enacting statutes whose effect is to terminate existing claims. *See United States Dep't of Justice* v. *Provenzano,* 469 U.S. 14, 15 (1984) (per curiam); *Taxpayers for the Animas-La Plata Referendum* v. *Animas-La Plata Water Conservancy Dist.,* 739 F.2d 1472, 1477 (10th Cir. 1984).

Justiciability

Tropicana contends that the legislation will render plaintiffs' claims moot. *Party-in-interest's Motion to Stay* at 6. It will also defeat the existence of a genuine case or controversy. *Id.* at 7. Plaintiffs' response is that, even adopting Tropicana's construction of § 423, Customs rulings will stand with respect to imports of ethanol pursuant to the United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. 99–47, 99 Stat. 82 (1985), codified following

[7] Plaintiffs' construction would render the distinction Congress drew between § 423(c)(2)(A) and § 423(c)(2)(B) nugatory. The former provision allows duty-free entry for fuel ethanol completely produced, i.e., both fermented and distilled in a beneficiary country. The latter provision allows for duty-free entry of fuel ethanol that is merely distilled in a beneficiary country so long as it is dehydrated from locally produced hydrous ethanol of a specified percentage. Congress could have chosen simply to require all ethanol to be fully processed into fuel-grade ethanol within a beneficiary country. It specifically did not do that and provided the alternative found in § 423(c)(2)(B).

19 U.S.C. § 2112 (Supp. III 1985). This statute contains provisions similar to those of CBERA. *Compare* 19 U.S.C. § 2703 *with* Pub. L. 99–47, § 402. Plaintiffs also speculate that the United States may enter trade agreements with Canada, pursuant to 19 U.S.C. § 2112 (1982 & Supp. III 1985), under terms similar to those of CBERA. Imports of ethanol from Canada or Israel would be governed by the Customs rulings as they now stand, and not by § 423, since § 423 only applies to imports from the Caribbean or U.S. insular possessions.

Plaintiffs also contend that the action is not moot at this point since Customs can continue to apply its current administrative rulings. Theoretically, a judgment in this action may have impact upon entries made prior to December 31, 1986.[8] As a practical matter, however, it is not feasible to conduct discovery, to schedule a trial, and render judgment by that date.[9] The Customs Service will initially implement the provisions of the new legislation. Parties aggrieved by administrative interpretations made under the new law can then seek judicial redress. This action, brought to contest the liquidation of one entry under current law, is not the appropriate vehicle to predict future applications of new legislation. Bearing in mind the prospective nature of § 1516 relief, it would be foolish to commit the resources of this Court and the parties to meaningless litigation.

Plaintiffs' other claims are wholly unconvincing. If plaintiffs believe that ethanol imports from Israel or Canada are being improperly liquidated, then challenge should be made to those entries. I fail to see how plaintiffs' extensive discovery requests aimed at Tropicana shed any light on azeotropic distillation facilities in Israel or Canada, if indeed there are any.[10] As explained above, the question of whether imports of ethanol from outside the Caribbean Basin region are eligible for duty-free status is best left for the time when actual entry of such imports is being made. At that time, the administrative agency, and ultimately the courts, can consider the statute and the particular factual circumstances at issue with regard to those imports.

Conclusion

Congress has indicated its disagreement with administrative rulings affording duty-free treatment to fuel ethanol merely distilled in the Caribbean and has enacted legislation which renders, for all

[8] It should be noted, however, that the Court was informed, in a letter from counsel for the defendants dated Nov. 17, 1986, that "Tropicana has assured the United States and counsel for [plaintiffs] that it will not import any ethanol prior to January 1, 1987."

[9] Moreover, there is a question as to what is the "final judicial decision in the action," referred to in 19 U.S.C. § 1516(f). In light of 28 U.S.C. § 2645(c) (1982), it might be argued that any decision of this Court would not be final until a timely filed appeal was decided. In that event, it becomes even more obvious that final judgment in this action is not possible by December 31, 1986.

[10] Tropicana has submitted an affidavit from a Branch Chief of the Office of Enforcement of the Customs Service who avers that from Oct. 1, 1984 through July 31, 1986, there were no entries of ethyl alcohol from Israel for nonbeverage purposes under item 427.88, TSUS.

practical purposes, the current controversy moot.[11] The Court has considered, for the purposes of this motion, the effect of § 423 on the current version of CBERA. It remains the task of Customs to apply the new statute to actual entries made after December 31, 1986. At that time, plaintiffs may seek to challenge the application of the statute. This Court, however, is unwilling to continue the litigation where there is no possibility of rendering a meaningful judgment. Therefore, this action is hereby dismissed.

(Slip Op. 86–128)

HOLT HAULING AND WAREHOUSING SYSTEM, INC., PLAINTIFF *v.* U.S. CUSTOMS SERVICE, WILLIAM J. GRIFFIN, REGIONAL COMMISSIONER OF CUSTOMS FOR THE NORTHEAST REGION, ANTHONY L. PIAZZA, DISTRICT DIRECTOR OF CUSTOMS FOR THE PHILADELPHIA DISTRICT, AND WILLIAM DUNCAN, HEARING OFFICER, DEFENDANTS

Court No. 86–8–01048

Before TSOUCALAS, *Judge*

Plaintiff contests the Regional Commissioner's action to suspend its bonded warehouse license claiming the decision should be set aside as procedurally defective and as not supported by substantial evidence.

Held: The Regional Commissioner's decision is supported by substantial evidence on the agency record; was not arbitrary, capricious, or an abuse of discretion; and plaintiff was afforded notice and an opportunity to comply pursuant to 5 U.S.C. § 558(c).

[Plaintiff's motion for judgment on the agency record denied; defendants' motion for summary judgment granted.]

(Decided December 10, 1986)

Donohue and Donohue (Joseph F. Donohue and *Joseph F. Donohue, Jr.)* for the plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Barbara M. Epstein)* for the defendants.

OPINION

TSOUCALAS, *Judge:* Plaintiff filed this action to contest the final determination by the Regional Commissioner of Customs for the Northeast Region, on August 15, 1986, to suspend plaintiff's bonded warehouse status for one year, pursuant to 19 C.F.R. 19.3(f). The notice of suspension states plaintiff released certain bonded merchandise to its customers prior to payment of duty and prior to plaintiff

[11] The Court expresses no opinion as to whether ethanol merely distilled in a beneficiary country has been substantially transformed thereby qualifying for duty-free treatment under CBERA as originally enacted. It is important to note that the legislative history to § 423 is not necessarily reflective of the intent of the Congress that initially drafted CBERA. Generally, the views of a subsequent Congress carry little weight in interpreting prior legislation. *Maine Potato Council* v. *United States,* 9 CIT 293, 613 F. Supp. 1237, 1243 (1985) citing *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 170 (1968); *Southeastern Community College* v. *Davis,* 442 U.S. 397, 411 (1979). At the same time, this approach is not universally followed. *See, e.g., Heckler* v. *Turner,* 470 U.S. 184, 211 (1985); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 380–81 (1969) (amendatory legislation evinced widespread Congressional intent to ratify long-standing construction of statute). In any event, the Court, since it does not reach the merits of plaintiffs' claim, need not assess the retrospective weight of the legislative history of the Tax Reform Act.

obtaining the required written documents indicating Customs had authorized release; and, in addition, certain bonded and nonbonded merchandise were intermingled, preventing reconciliation of inventory with warehouse entry permit folders. The Regional Commissioner determined these actions involved substantial volumes of merchandise which covered numerous transactions over an extended period of time. Pursuant to plaintiff's motion for a preliminary injunction, on September 4, 1986, this Court stayed enforcement of the suspension until a decision on the merits of the action was rendered.[1] The action is now before this Court on defendant's motion for summary judgment on the administrative record, pursuant to USCIT R. 56. Plaintiff has also moved for judgment on the record, to set aside the Regional Commissioner's decision. On November 25, 1986, oral arguments were heard by this Court.

Plaintiff challenges the Regional Commissioner's decision to suspend its bonded warehouse status as: (1) procedurally defective in failing to comply with the Administrative Procedure Act (APA), 5 U.S.C. § 558(c); (2) unsupported by substantial evidence; and, (3) as arbitrary, capricious, an abuse of discretion and not in accordance with law. 5 U.S.C. § 706.

The defendant claims that the Commissioner's decision is supported by substantial evidence on the record; that plaintiff was not entitled to notice since its conduct was willful; and, alternatively, plaintiff was provided sufficient notice pursuant to § 558(c) of the A.P.A. and no material prejudice resulted from the agency's action.

Background

In December 1982, Customs amended its procedures in reference to bonded warehouses transferring the responsibility of maintaining documentation as to in-bond movement to the warehouse proprietor, thus eliminating the necessity of posting a Customs officer at each warehouse. *See* T.D. 82–204, 16 Cust. Bull. 520 (1982). The record indicates that in November 1982, Customs Officer Corrigan instructed Holt personnel as to the new procedures with the aid of a procedural manual. While the length and depth of this instructional meeting are disputed, Holt personnel were nonetheless furnished with the guidelines as to recordkeeping and as to the requirements for withdrawal of merchandise.

Between August 8 and 15, 1985, Customs conducted an audit of Holt's premises. The auditors determined that nine entries of plywood and russwood with a total value of $1,156,267 were released prior to duty in the amount of $115,627 being paid. They further discovered that four million gallons of frozen juice relating to ten separate warehouse entries had been released by plaintiff without proper documentation and that bonded and non-bonded frozen juice were intermingled in the refrigerated section preventing a proper

[1] As a condition of this Court's order, plaintiff filed a judicial bond in the amount of $800,000, and a copy of its current warehouse bond in the amount of $200,000, with the court.

inventory control. Plaintiff was not informed that this audit was forthcoming despite specific language in the procedural handbook requiring the contrary.

On August 16, 1985, the District Director, without written notice to Holt, decided that the warehouse should be closed based on the auditor's findings, and ordered that the entry and withdrawal of merchandise from the warehouse be monitored by Customs officers. On August 16, 1985, an executive officer of Holt was apprised of the violations, when the District Director delivered to Holt's vice president an agreement with five conditions. R. Doc. 10–1. The agreement states "Holt's Hauling & Warehouse System, Inc. requesting the reopening of their bonded warehouse in Gloucester City, New Jersey hereby agrees to the following conditions * * *." Briefly summarized, the five conditions were:

1. providing personnel to assist Customs in conducting an inventory of plaintiff's merchandise;
2. rearranging cargo to segregate bonded merchandise;
3. installation of a failsafe procedure for entry and withdrawal of merchandise;
4. to not release bonded cargo without payment of duty or proof of duty paid; and
5. delivery of $1,000,000 unconditional letter of credit to the District Director.

When the President of Holt met with the District Director to discuss the proposal, Mr. Holt informed him that it was financially not feasible to post this letter of credit and it appeared that no other offers for security made by Mr. Holt (in the form of increased bonds, corporate or personal guarantees) were acceptable. Nonetheless, the warehouse was temporarily reopened.

On August 28, 1985, the District Director provided plaintiff formal notice to show cause why its bonded warehouse status should not be revoked or suspended. This notice was further detailed on September 10, 1985, in response to plaintiff's request for additional information.[2] Following plaintiff's response to these charges, a hearing was held on January 22–23, 1986. Based on the decision of the hearing examiner recommending suspension, the Regional Commissioner issued his decision to suspend plaintiff's bonded warehouse status for one year. That decision is the subject of this action.

Plaintiff's primary contention, which it has pursued since the inception of these proceedings, is that Customs did not comply with

[2] In essence the notice set forth these contentions:

Holt Hauling refused or neglected to obey any proper order of a Customs officer or any Customs rule or regulation relative to the operation or administration of a bonded warehouse in violation of 19 C.F.R. 19.3(e)(2).

(a) Holt, on or prior to September 28, 1984, released and delivered 1,954 crates of plywood and nine crates of russwood with duty of $115,644 owed without withdrawal from warehouse entry.

(b) During 1984 and 1985, ten entries of orange and pineapple juice were delivered to customers prior to payment of duty of $567,882.00 and prior to Customs releasing the merchandise.

(c) During August 9–August 15, 1985, the period of a Customs audit, orange and pineapple juice was stored in a manner to prevent reconciliation of bonded warehouse merchandise with warehouse entry permit folders.

In the September 10th letter, it is alleged that one or more Customs officers warned plaintiff of violations of the regulations and despite numerous orders to correct delivery of cargo without proper documentation and payment of duty, plaintiff failed to comply.

§ 558(c). It is apparent that suspension of plaintiff's license is governed by the procedural requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c), which provides in pertinent part:

> * * * Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Congress recognized that licensees "are subjected to irreparable injuries unless safeguards are provided. The purpose of this section is to remove the threat of disastrous, arbitrary, and irremediable administrative action." *Administrative Procedure Act: Legislative History,* S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946).[3] The legislative history further indicates that this "section is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency." S. Doc. No. 248, *supra* at 35. The demonstrable facts must fully and fairly warrant application of the exceptions. "Willfullness must be manifest." *Administrative Procedure Act,* S. Rep. No. 752, 70th Cong., 1st Sess. 25–26 (1945) *reprinted in Administrative Procedure Act: Legislative History,* S. Doc. No. 248, *supra,* at 211–212.

The procedures in § 558(c) have been interpreted to afford a licensee a "second chance" to conform with regulatory mandates before more formal agency action, in the nature of suspension or revocation, is undertaken. *Gallagher & Ascher Co.* v. *Simon,* 687 F.2d 1067, 1074 (7th Cir. 1982). *Blackwell College of Business* v. *Attorney General,* 454 F.2d 928, 933§ 934 (D.C. Cir. 1971). Absent a finding of willfulness, the licensee is entitled to written notice of the facts warranting suspension as well as an opportunity to remedy those transgressions before actual suspension. *Gallagher & Ascher Co.* v. *Simon,* 687 F.2d at 1074; *American Fruit Purveyors, Inc.* v. *United States,* 630 F.2d 370, 374 (5th Cir. 1980), *Cert. denied,* 450 U.S. 997 (1981).

Willfulness has been defined as the (1) intentional performance of an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) action which carelessly disregards statutory requirements. *Goodman* v. *Benson,* 286 F.2d 896, 900 (7th Cir. 1961); *Koden* v. *United States,* 564 F.2d 228, 234 (7th Cir. 1977). The agency's burden was to show petitioner's "actions were intentional as opposed to accidental." *Lawrence* v. *Commodity Futures Trading Commission,* 759 F.2d 767, 773 (9th Cir. 1985).

[3] This refers to § 9(b) of the A.P.A. of 1946, the predecessor section to § 558(c), almost identical in language, as to the pertinent parts.

Defendant argues that the Commissioner impliedly found willful conduct on plaintiff's part since the Commissioner expressly stated that his decision was based on the recommendation of the hearing officer, who concluded:

> Since the wrongful release occurred systematically over an extended period of time involving a large volume of merchandise and substantial duty loss, it is concluded it was reasonable to act on the basis that "willfullness" was involved.

R. Doc. 2 at 12. In the cases applying the willfulness exception in § 558(c), the licensees either received prior warning letters, *Goodman* v. *Benson,* 286 F.2d 896; *Lawrence* v. *Commodity Futures Trading Commission,* 759 F.2d 767, or were subject to a previous court order, *American Fruit Purveyors, Inc.* v. *United States,* 630 F.2d 370; *Lawrence* v. *Commodity Futures Trading Commission, supra,* informing them that their conduct was not satisfying agency regulations. In each instance the licensee again disregarded the warnings or orders by engaging in similar conduct.

While no warning letters were sent, nor was plaintiff subject to any previous court order, Customs officers testified that they noted missing documents in plaintiff's files long before the audit of August 1985, and apparently orally warned plaintiff's personnel. These employees were in possession of the handbook which outlined the procedures to follow for the entry and withdrawal of merchandise. Even though these witnesses testified that they did not completely understand the manual there was no effort made on their part to seek clarification or assistance from the Customs officers with whom they dealt. The violations were not isolated instances, but occurred well over a thirteen-month period. Plaintiff claims there was no express finding of willfulness and that the evidence does not support such a finding. However, even if the possibility exists of drawing two inconsistent conclusions from the evidence, that does not prevent a finding that the agency's action was supported by substantial evidence. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619–620 (1966). In light of the aforementioned facts, there was a reasonable basis to support the conclusion that plaintiff's conduct was willful. As the Supreme Court stated, "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, * * * we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285–86 (1974). The Regional Commissioner's determination, while succinct, nonetheless stated it was based on the hearing examiner's recommendation, which was a 17-page analysis of the testimony and exhibits. In these circumstances, the agency's reasoning process may be discerned.

Nonetheless, plaintiff was afforded the procedural safeguards provided in § 558(c). This section states that license suspension is law-

ful only if *before institution* (emphasis added) of these proceedings, plaintiff was given written notice and an opportunity to comply. While the District Director's letter of August 28, 1985, instituted these proceedings,[4] and cannot satisfy the requirement of § 558(c), plaintiff did receive formal written notice prior to that time. This was provided by the proposed agreement presented by the District Director to Ms. Robbins, Vice President, on August 16, 1985. At the time Ms. Robbins was confronted with this proposal, also present were the auditors who had discovered the irregularities during their inspection at Holt. While it appears that the District Director was less than amenable to discussion about these violations, R. Doc. 7 at 97, 98, the auditors did give Ms. Robbins a general overview of the discrepancies they encountered, R. Doc. 7 at 99. Although the tenor of the hearing transcript indicates that the District Director had already predetermined that Holt's facility should be closed unless a letter of credit in the amount of $1,000,000 was posted, this meeting nonetheless put a corporate officer at Holt on notice as to the areas in operation of their warehouse which needed substantial improvement. This written proposal, in addition to the explanation by the auditors, albeit cursory, satisfied the written notice requirements of § 558(c).

Furthermore, while there is no prescribed time period in the statute in which the opportunity to comply must be afforded, it is enough if the "opportunity be 'accorded,' on some fair and reasonable basis." *Shuck* v. *SEC,* 264 F.2d 358, 360 (D.C. Cir. 1958). In *Gallagher* v. *Ascher, supra,* two licensees (customs brokers) received warning letters, on March 15, 1976 and July 22, 1976, and July 23, 1976, respectively; the actual suspension letters were not issued until September 13, 1976. The court held that "[t]hese warning letters provided more than sufficient notice of the facts warranting the suspensions and allowed the brokers more than adequate time to put their houses in order and thereby avoid the subsequent suspensions." 687 F.2d at 1076.

While it appears that there was only a twelve day "second chance" period (from the August 16, 1985, notice until the institution of the agency action on August 28, 1985), this Court is guided by those cases holding that procedural errors must be prejudicial to the adverse party in order to set aside the action. *American Motorists Insurance Company* v. *United States,* 5 CIT 33, 43 (1983); *Woodrum* v. *Donovan,* 4 CIT 46, 52, 544 F. Supp. 202, 207 (1982); *See also* 5 U.S.C. § 706. Practically viewing the record, it cannot be said that prejudice resulted to the plaintiff. Plaintiff submitted a response to the District Director's charges; it had the opportunity to bring forth evidence at the hearing to militate against a recommendation of suspension, and even before the actual notice of suspension, plain-

[4] Section 19.3(e) states that the procedures which shall be followed for license suspension are set forth in § 19.3(f). The first sentence of that regulation provides:

> The district director may at any time serve notice in writing upon any proprietor of a bonded warehouse to show cause why his right to continue the bonded status of his warehouse should not be revoked or suspended for cause.

tiff submitted further arguments to the Regional Commissioner. It is apparent that plaintiff was afforded the opportunity to demonstrate compliance and present any mitigating evidence well in advance of the final decision by the Regional Commissioner.

Turning to the substantive issue before the Court, the question is whether, considering the entire record, the Regional Commissioner's findings are supported by substantial evidence. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 477 (1951). *Baltimore Security Warehouse Co.* v. *United States,* 9 CIT——, Slip Op. 85–131 at 7 (Dec. 13, 1985); 28 U.S.C. § 2640(d); 5 U.S.C. § 706. This standard requires the Court to uphold the agency action as long as there is such evidence in the record as a reasonable mind would accept to support the conclusion reached. *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938).

The Regional Commissioner's action to suspend plaintiff's bonded warehouse status was taken pursuant to 19 C.F.R. 19.3(e), which provides that the bonded warehouse proprietor's right to operate may be suspended for cause if:

> (2) The warehouse proprietor refuses or neglects to obey any proper order of a Customs officer or any customs order, rule, or regulation relative to the operation or administration of a bonded warehouse;[5]

It is alleged that plaintiff's practices were in violation of 19 C.F.R. § 19.6(b)(1) and § 144.39. These sections allow for the withdrawal of bonded merchandise from the warehouse through the use of a withdrawal permit approved by Customs, indicating its authorization to release the merchandise. The warehouse proprietor must maintain these documents and will be relieved of responsibility only for the merchandise shown on the application for withdrawal. Plaintiff was also found to have failed to maintain permit file folders in violation of 19 C.F.R. § 19.12(a)(2).

The first charge alleged against plaintiff in violation of the above regulations includes the premature release of 2388 crates of plywood[6] and nine crates of russwood before obtaining warehouse withdrawals which document that duty has been paid (the amount of duty was $92,000).[7] Plaintiff does not dispute this allegation. However, plaintiff does contest the Regional Commissioner's conclusion that this violation resulted from a faulty system design and lack of an adequate control system.

The evidence indicates that when customers requested release of merchandise, plaintiff's personnel checked the customer inventory control cards. These were prepared from information generated from their computer. In two situations, the source of the input data,

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[5] Authority for the Secretary of the Treasury to promulgate regulations for the establishment and operations of bonded warehouses to protect the Government's interest in the withdrawal and accounting of merchandise is found in 19 U.S.C. § 1556.

[6] Originally, the District Director stated that this amount was 1954 crates. At the hearing, it was revealed that a "clerical error in computation" occurred in the auditors preliminary analysis, but their final report indicates the correct amount.

[7] The District Director originally stated that the duty owing was $115,644. However, the Regional Commissioner reduced this amount in his final decision based on plaintiff's contention that the duty rate was incorrect.

the delivery orders from the customs brokers, omitted the in-bond notation. In the other seven situations, the computer operator failed to enter the bonded status into the computer. These omissions carried forward to the control cards, and thus, plaintiff claims its personnel did not know that the merchandise in question was in-bond. There was evidence introduced that when bonded information was entered into the computer, early withdrawals did not occur. Nevertheless, the auditors' report indicates that these wrongful releases occurred from August 12, 1983 until October 9, 1984, which is a significant period of time. It was not until the audit in August 1985, that these discrepancies were discovered. Plaintiff clearly did not have an adequate control system over the release of bonded merchandise since during a two year time period this problem was never internally detected, even though annual inventories were required. While there was evidence as to the remedial steps taken by plaintiff to check the warehouse receipts against the delivery orders, the hearing officer found that plaintiff's personnel were still unaware of the necessity to check plaintiff's warehouse receipts against Customs' warehouse entry and withdrawal documents.

In reviewing the second charge against plaintiff, the evidence bears out that about 10 entries of 4 million gallons of orange and pineapple juice were released to plaintiff's customers prior to presentation of the warehouse withdrawal permit indicating Custom's approval. Plaintiff offers as an explanation that its personnel verbally check with the customs broker to see whether and when duty will be paid on goods requested by the customer to be released. This employee then tries to "time" the release of merchandise to the point when she estimates Customs will authorize withdrawal of the merchandise. However, the record indicates that release was effectuated on 10 entries from one to 46 days before duty was actually paid. This employee testified that in her experience if the broker said he had the duty, it was always paid.

While plaintiff does not directly deny this practice, it argues that none of the Customs regulations cited require that the proprietor actually have the withdrawal documents in its possession before goods are released. The Court is not persuaded by this argument. 19 C.F.R. § 19.6(b)(1) allows for the withdrawal of merchandise by use of a permit for withdrawal (§ 144.39). It goes on to state that the warehouse proprietor will be relieved of responsibility only for the merchandise shown on the application for withdrawal. Section 144.39 states that the approved permit shall be presented to the warehouse proprietor as evidence of Customs authorization for withdrawal. The procedural manual provides that the duty paid withdrawal forms can be taken to the warehouse to effect release and the proprietor *must* take whatever steps are necessary to insure the proper amount of packages are released. Plaintiff's interpretation of the regulations would render meaningless the terms "relieved of responsibility" in § 19.6, and in § 144.39, that the per-

mit *shall* be presented to warehouse proprietor as evidence of Custom's authorization. The violation occurs because Customs is not yet in possession of the duties whereas the customer is in possession of the merchandise. While Holt personnel attempt to service its customers by prompt release of merchandise, it ran the risk of jeopardizing Customs control over improper releases.

There is also substantial evidence to document the contention that frozen juice was improperly stored. The auditors report indicates that in-bond and duty paid drums of juice were intermingled; material under a particular warehouse entry were not stored together; the material was not marked properly with warehouse entry numbers; and, some material was inaccessible to inventory. These are violations of 19 C.F.R. § 19.12(b)(6) which provides:

> (b) *Security and storage.* The warehouse proprietor shall comply with the following security and storage requirements.
>
> * * * * * * *
>
> (6) *Manner of storage.* Packages shall be received in the warehouse and recorded in the proprietor's inventory and accounting records according to their marks and numbers. * * * The warehouse proprietor shall mark all shipments for identification, showing the general order or warehouse entry number or seizure number and the date of the general order, entry, or delivery ticket in the case of seizures. All containers covered by a given warehouse entry, general order or seizure shall be stored in the same location and not mixed with goods covered by any other entry, general order or seizure unless approval has been given in writing by the district director for an exception from this requirement. The proprietor must provide, upon request by a Customs officer, a record balance of goods covered by any warehouse entry, general order, or seizure so a physical count can be made to verify the accuracy of the record balance.

However, as the hearing officer concluded, this is relatively easy to correct and is of moderate significance. Although this does not seem the type of violation, which alone warrants suspension, it was just one of a pattern of violations for which suspension is authorized.

The choice of an authorized penalty by the administrative agency in suspending plaintiff's bonded status is an exercise of discretion. *Tempo Trucking and Transfer Corp.* v. *Dickson,* 405 F. Supp. 506, 514 (E.D.N.Y. 1975). In determining whether the decision reached by the administrative agency was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the "reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. at 285. Plaintiff has introduced evidence that its employees are now advised that no merchandise is to be released without proof that duty has been paid or without Customs authorization, and has also alleged that it has reviewed its sys-

tem for marking and storing its refrigerated merchandise. It was further concluded by the hearing officer that there was no evidence that plaintiff intended to defraud the government by these practices or that it directly profited from the early withdrawals. These mitigating factors appear to have been considered since they were discussed by the hearing officer and it is reasonable to conclude that they influenced his recommendation for a one year suspension as opposed to total revocation. "An agency's choice of sanction is not to be overturned unless the reviewing court determines it is unwarranted in law * * * or without justification in fact." *Kulkin* v. *Bergland,* 626 F.2d 181, 184 (1st Cir. 1980), quoting *Butz* v. *Glover Livestock Commission Co., Inc.,* 411 U.S. 182, 185–86 (1973). Based on a thorough review of the record, this Court is of the opinion that there is a basis in fact for the Regional Commissioner's decision.

Conclusion

There being no procedural irregularities in the agency's action, no abuse of discretion, and substantial evidence on the record to support the Regional Commissioner's decision, plaintiff's motion must be denied and judgment entered in favor of defendant.

(Slip Op. 86–129)

Rio Contratos De Costura, S.A., plaintiff *v.* United States, defendant

Court No. 83–03–00316

Memorandum

[Defendant's motion to dismiss granted.]

(Decided December 10, 1986)

Stein Shostak Shostak & O'Hara (S. Richard Shostak and *Robert Glenn White)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Susan Handler-Menahem)* for the defendant.

[Plaintiff's motion for summary judgment granted; defendant's cross-motion for summary judgment denied.]

Aquilino *Judge:* This action was commenced on February 23, 1983, which was the 180th or last day to do so in accordance with 28 U.S.C. § 2636(a). On that date, the plaintiff placed a check in the amount of the disputed duties in the mail, addressed to the Customs Service, which received the money some time later.

The defendant has moved to dismiss this action on the ground of lack of jurisdiction in that plaintiff's payment was not in conformity with 28 U.S.C. § 2637(a), which provides that an action such as this may be commenced "only if all liquidated duties, charges, or exactions have been paid at the time" of commencement.

The issue raised by the motion is thus the same as that raised in *Nature's Farm Products, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–108 (Oct. 22, 1986), *notice of appeal filed* Dec. 8, 1986, wherein this court concluded that mailing duties on the last day, with resultant late receipt of them by Customs, does not satisfy the foregoing condition of 28 U.S.C. § 2637(a). Judgement was therefore entered, dismissing that action, and the court concludes that its reasoning applies equally to this action and entitles the defendant to grant of the same relief.

(Slip Op. 86–130)

AMERICAN HARDBOARD ASSOCIATION, PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND MACMILLAN BLOEDEL LIMITED, PARTY-IN-INTEREST

Court No. 83–9–01301

Before DICARLO, *Judge.*

[Plaintiff's and defendant's motions to dismiss the action in part are denied; party-in-interest's motion to file a supplemental pleading and cross-claim is denied.]

(Decided December 10, 1986)

Keck, Mahin & Cate (Brock R. Landry and *Robin W. Grover)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Saul Davis)* for defendant.

Busby, Rehm & Leonard, P.C. (John B. Rehm and *Munford Page Hall, II)* for party-in-interest.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* American Hardboard Association (plaintiff) is a trade association of domestic manufacturers of hardboard products. Pursuant to 19 U.S.C. § 1516(a) (1982), plaintiff filed a petition with the Secretary of the Treasury (Secretary) challenging the United States Customs Service (Customs) classification of merchandise imported from Canada by MacMillan Bloedel (party-in-interest) as "Building boards not specially provided for, whether or not face finished, other boards, of vegetable fibers (including wood fibers)—Other," under item 245.90, Tariff Schedules of the United States (TSUS). Merchandise classified under item 245.90, TSUS is entitled to duty-free entry. In its petition plaintiff contended that the merchandise is dutiable as "items not specifically provided for, of wood," under item 207.00, TSUS, or as "hardboard, whether or not face finished," under TSUS items 245.00, 245.10, 245.20 or 245.30, depending on value and face finish.

Customs denied plaintiff's petition. Plaintiff filed a timely notice under 19 U.S.C. § 1516(c) (1982) that it intended to challenge Customs determination, and brought an action contesting the denial of the petition under 28 U.S.C. §§ 1581(b) and 2631(b) (1982). Under 19

U.S.C. § 1516(e) party-in-interest appeared in the action, seeking to maintain the duty-free status of its merchandise under item 245.90, TSUS.

Before trial, plaintiff amended its complaint to include an alternative classification of the merchandise under item 245.80, TSUS, as "Laminated boards bonded in whole or in part, or impregnated, with synthetic resins." Defendant and party-in-interest did not object to the amendment. After hearing evidence at trial relating to the merits of the government's classification and the claimed classifications in the original complaint, the Court, without objection from the parties, remanded to Customs for examination of the alternative claim raised in the amended complaint. The Court retained jurisdiction over all questions relating to the alternative claim.

Customs published notices in the Federal Register on March 11, and April 15, 1986 that it was reviewing the tariff classification of the merchandise at the direction of the Court. After receiving comments and reviewing the relevant tariff provisions, Customs reported to the Court its determination that the merchandise is classifiable under the alternative claim, item 245.80, TSUS.

> After careful analysis of the comments submitted, and further review of the matter, Customs finds that the subject hardboard lap siding, which is manufactured through a process whereby a newsprint face is overlaid on a wet wood fiber mat and combined with the mat through the application of heat and pressure, is classifiable as a building board, not specially provided for, whether or not face finished: laminated boards, bonded in whole or in part, or impregnated, with synthetic resins, under item 245.80, TSUS, dutiable at the rate of 1.4 cents per pound plus 2.6 percent ad valorem.

Tariff Classification of Prefinished Hardboard Siding, 51 Fed. Reg. 39368, 39370 (October 28, 1986).

Although the government now contends that plaintiff's alternative classification is correct, plaintiff still seeks adjudication of its claim that the merchandise is properly classified under item 245.30 or 207.00, TSUS.

Plaintiff and defendant move "that the 245.80 claim be dismissed as moot" since the government no longer denies plaintiff's claim under that provision. Brief for plaintiff at 3; *see* brief for defendant at 3. They contend that the Court may not consider whether item 245.80, TSUS is the proper classification, and that the only issue remaining in the case before the Court is whether the tariff provisions claimed in the original complaint should prevail over the government's original classification. Party-in-interest continues to argue that item 245.90, TSUS is correct and moves to file a supplemental pleading containing a cross-claim against the government that the merchandise should be classified under item 245.90, TSUS rather than under item 245.80, TSUS.

The questions presented are: (1) whether the Court may determine the correct classification of merchandise subject to an action brought under section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (1982), where Customs on remand has determined its original classification to be incorrect and conflicting claims as to the proper classification continue to be asserted; and (2) if so, whether party-in-interest must file a cross-claim in order to assert its claim that the merchandise should not be classified under item 245.80, TSUS. The Court holds that it has jurisdiction to determine the correct classification of the merchandise, and that party-in-interest may raise its arguments concerning the correctness of item 245.80, TSUS without filing a cross-claim.

The remand powers of the Court are set forth in 28 U.S.C. § 2643(b) (1982) which states:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

The legislative history of section 2643(b) states:

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be coextensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.
>
> *Subsection (b) has particular impact on civil actions brought pursuant to section 515 or 516 of the Tariff Act of 1930.*

H. Rep. No. 1235, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3772 (emphasis added).

Plaintiff's and defendant's argument rests on the assumption that even after the government concedes that its classification is erroneous, the Court may be requested by plaintiff and the government to decide a case under section 1516 by comparing selective tariff provisions, each of which may be incorrect. The government states:

> It may appear that this Court is in an anamolous position. It is requested by [plaintiff] and the United States to decide this case by ascertaining whether item 245.90, TSUS is more appropriate than item 245.30 and 207.00, TSUS, when it knows that Customs will, in the future, not apply item 245.90, TSUS, if the court finds that item 245.30 and 207.00, TSUS, do not apply to [party-in-interest's] siding.

Reply brief for defendant at 13. The Court agrees that such a position is anomolous, but finds that it is not constrained to reach this result.

Our appellate court discussed the remand powers of this Court in the landmark case *Jarvis Clark Co.* v. *United States*, 773 F.2d 873, *reh'g den.*, 739 F.2d 628 (Fed. Cir. 1984). In that case, where the government's classification was found to be incorrect, the court stated:

> [Section 2643(b)] is more logically interpreted as mandating that the court reach a correct decision in every case; but the statute leaves to the court the discretion whether it should remand for further proceedings or should reach the correct decision on its own. Remand may not always be the appropriate means for finding the right answer; however, whether the court remands, conducts its own hearing, or simply examines the law and the tariff schedules on its own initiative, it is required to reach a *correct* result.

Id. at 878 (emphasis in original).

Defendant requests that our appellate court's interpretation of section 2643(b) not be followed since *Jarvis Clark* was an action brought under section 1514, and therefore it is *"obiter dictum"* in this case. Brief for defendant at 10, n.6. But as the *Jarvis Clark* opinion indicates, the interpretation of section 2643(b) applies regardless whether it is an importer or a domestic industry that challenges the classification of merchandise. *See Jarvis Clark*, 739 F.2d at 876 & n.4.

Defendant also argues that Congress could not have intended that the Court reach the correct classification in actions brought under section 1516 because of the many procedural differences between those cases and actions commenced under section 1514. Although there are procedural dissimilarities, the language of the legislative history on which the *Jarvis Clark* holding rests expressly applies in cases brought under both section 1514 and section 1516.

Congress has required that prospective effect be given to judgments of the Court of International Trade in actions under section 1516. 19 U.S.C. § 1516(f) states in part:

> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action. * * *

It is unlikely that Congress would require Customs to classify merchandise in accordance with the judgment of the Court if the Court for example, sustained plaintiff's claim under item 245.30, TSUS or item 207.00, TSUS but had not considered the tariff provision which Customs now contends is correct.

Defendant would also have the Court find that the holding in *Jarvis Clark*, even as it applies to actions under section 1514, has been overruled by *V.G. Nahrgang* v. *United States*, 741 F.2d 1363 (Fed. Cir. 1984). In *Nahrgang*, the appellate court affirmed a decision by this Court dismissing an importer's challenge to the classification of merchandise by Customs. A dissenting judge stated:

> I do not agree with the majority that the trial court sustained the Customs Service classification but believe, instead, that the trial court held that the Customs Service classification was not precluded in view of the fact that appellant failed to establish its claimed classification. Accordingly, I would reverse the decision of the Court of International Trade and remand for further consideration in light of *Jarvis Clark*.

Id. at 1368 (Miller, J., dissenting). According to defendant, the dissent shows that "the *Nahrgang* majority refused to follow *Jarvis Clark*." Brief for defendant, at 10, n.6.

This argument is not persuasive. A better interpretation is that even though the decision by the Court of International Trade predated the holding in *Jarvis Clark*, the *Nahrgang* majority found that the proper classification had been reached in the lower court proceeding.

Furthermore, defendant fails to acknowledge that subsequent to *Nahrgang*, the United States Court of Appeals for the Federal Circuit has upheld the holding in *Jarvis Clark* that the Court must reach the correct result in classification cases where the government's classification is incorrect. *Childcraft Education Corp.* v. *United States*, 2 CAFC 121, ——, 742 F.2d 1413, 1414 (1984); *see also Amoco Oil Co.* v. *United States*, 3 CAFC 39, 749 F.2d 1576, 1578 (Fed. Cir. 1984); *Stewart-Warner Corp.* v. *United States*, 3 CAFC 20, 748 F.2d 663, 665 (1984). In the Court of International Trade the *Jarvis Clark* opinion has been cited as binding authority on at least 28 occasions. If the government believes that *Jarvis Clark* should be overruled it should address its arguments at an appropriate time to the Court of Appeals for the Federal Circuit or the United States Supreme Court.

Based upon the remand powers granted this Court in the Customs Courts Act of 1980, the legislative history of that Act, and the reasoning of the court in *Jarvis Clark*, the Court holds that the question whether the merchandise is correctly classified under item 245.80, TSUS is not moot. The Court "must consider whether the government's classification is correct, both independently and in comparison with" the alternative classifications. *Jarvis Clark*, 733 F.2d at 878. If the Court were prohibited from comparing item 245.80, TSUS with other provisions, the Court could be forced to decide the case by comparing erroneous tariff provisions. Since Customs contends that the original classification is incorrect and plaintiff continues to advance alternative claims by invoking the jurisdiction of the Court, the Court must consider the tariff schedules as a

whole and reach the correct classification. Plaintiff's and defendant's motions are denied.

Turning to the question whether party-in-interest must file a supplemental pleading and cross-claim to argue that the merchandise is classifiable under 245.90, TSUS, and not item 245.80, TSUS, the Court finds that it need not, since party-in-interest may raise this argument under its original pleadings.

19 U.S.C. § 1516(e) states:

> The consignee or his agent shall have the right to appear and to be heard as a party in interest before the Court of International Trade.

Accordingly, the party-in-interest may exercise the right granted in section 1516(e) so long as plaintiff continues to maintain this action pursuant to section 1516.

Plaintiff's and defendant's motions to dismiss in part are denied. Party-in-interest's motion to file a supplemental pleading is denied. The Court will convene a conference within 15 days to discuss the manner in which the action shall proceed.

ABSTRACTED CLASSIFICATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Iter
C86/213	DiCarlo, J. December 3, 1986	Border Brokerage Co.	78-6-01182	Item 692.16 5%	Item Fre
C86/214	DiCarlo, J. December 3, 1986	Import Leather, Inc.	82-2-00156 etc.	Item 121.59 5%, 2%, or 1%	Item Fre
C86/215	DiCarlo, J. December 3, 1986	MCF Footwear Corp.	86-8-01032	Item 700.95 12.5%	Item 10 Item 8.5
C86/216	DiCarlo, J. December 8, 1986	Import Leather, Inc.	82-8-01219, etc.	Item 121.59 5%, 2%, or 1%	Item Fre
C86/217	DiCarlo, J. December 8, 1986	Puma USA, Inc.	84-5-00664	Item 700.95 12.5%	Item 8.5
C86/218	DiCarlo, J. December 9, 1986	Import Leather, Inc.	80-10-01830, etc.	Item 121.59 5%, 2%, or 1%	Item Fre
C86/219	DiCarlo, J. December 9, 1986	Import Leather, Inc.	80-10-01836, etc.	Item 121.59 5%, 2%, or 1%	Item Fre
C86/220	DiCarlo, J. December 10, 1986	Marcel Watch Co.	84-12-01761	Item 760.0520 .115¢ each	Item 5.1

ON DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
em No. and rate		
666.00 ree of duty	Agreed statement of facts	Blaine Tracked 071 Madill Skidder
A121.65 ree of duty	Agreed statement of facts	Boston Leather
700.45 9% 700.35 5%	Agreed statement of facts	New York Footwear
A121.65 ree of duty	Agreed statement of facts	Houston Leather
700.35 5%	Agreed statement of facts	Seattle Footwear
A121.65 ree of duty	Agreed statement of facts	Boston Leather
A121.65 ree of duty	Agreed statement of facts	Boston Leather
688.36 1%	U.S. v. Texas Instruments, Inc. 673 F.2d 1375 (1982)	New York Pen watches

ABSTRACTED VALUATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/289	DiCarlo, J. December 3, 1986	Mitsubishi International, Corp.	82-6-00798, etc.	American selling price	Apprais pair

N DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ised values less 22% per	Agreed statement of facts	New Orleans Footwear

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